

PRIVACY JURISPRUDENCE AND THE APARTHEID OF THE CLOSET, 1946-1961

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INTRODUCTION

The sacking of Sumner Welles was a harbinger. A cold, brilliant patrician, Welles was a schoolmate and lifetime chum of President Franklin D. Roosevelt.¹ Roosevelt appointed Welles Under Secretary of State, a position from which Welles essentially controlled United

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1. See IRWIN F. GELLMAN, *SECRET AFFAIRS: FRANKLIN ROOSEVELT, CORDELL HULL, AND SUMNER WELLES* 60 (1995).

States foreign policy.² In 1941, FBI Director J. Edgar Hoover supplied Roosevelt with information pertaining to Welles's homosexual activities,³ but Roosevelt was unfazed. Armed with complaints that Welles had solicited sex from black railroad porters, U.S. Ambassador to France William Bullitt argued to the President that

the maintenance of Welles in public office was a menace to the country since he was subject to blackmail by foreign powers [which] had used crimes of this kind to get men in their power; and that . . . a terrible public scandal might arise at any time which would undermine the confidence of the country in him, the President.⁴

According to Bullitt, Secretary of State Cordell Hull "considered Welles worse than a murderer," and "morale in the Department of State and the Foreign Service was being ruined by the knowledge that a man of the character of Welles was in control of all appointments and transfers."⁵ On the eve of war with Hitler, it was imperative to rid the State Department of "criminals" like Sumner Welles, argued Bullitt.⁶ Roosevelt, fully aware of Welles' sexual crimes, nonetheless refused to believe that any newspaper would publish such a scandal.⁷ Only after Bullitt supplied Republican Senator Ralph O. Brewster of Maine with information pertaining to Welles's notorious homosexual activities, and Brewster threatened to launch a Senate probe,⁸ did Roosevelt ask Welles for his resignation.⁹

The firing of Welles, whom Bullitt described as Roosevelt's "Achilles Heel,"¹⁰ reflected the emergence of the closet as the residing place for homosexuals. Roosevelt and Welles assumed that Welles could lead a "double life"—that Sumner Welles the criminal was segregable from Sumner Welles the friend and public servant—as long as his homosexuality remained closeted in secrecy. Prior to the 1940s, same-sex intimacy was literally unspeakable, as the homosexual and society conspired to keep the matter secret. By the 1940s, however, the edges separating the two halves of the double life were eroding, as greater numbers of homosexuals transgressed the lines separating public and private spheres and more heterosexuals became curious about the secret life, either to condemn it, to explore it,

2. See *id.* at 130-31; see also David K. Johnson, "Homosexual Citizens": Washington's Gay Community Confronts the Civil Service, WASH. HIST., Fall-Winter 1994-95, at 50.

3. See GELLMAN, *supra* note 1, at 236-37.

4. FOR THE PRESIDENT: PERSONAL AND SECRET, CORRESPONDENCE BETWEEN FRANKLIN D. ROOSEVELT AND WILLIAM C. BULLITT 513 (Orville H. Bullitt ed., 1972).

5. *Id.*

6. *Id.* at 513-14.

7. See *id.* at 513.

8. See *id.*

9. See *id.* at 514-16.

10. *Id.* at 515.

or both. The erosion required the homosexual to decide whether to openly admit homosexuality or to keep the private life closeted and separate from the public one for fear that exposure of the former could destroy the latter.

While the closet has become the classic metaphor for homosexual secrecy,¹¹ it is of surprisingly recent origin, not gaining currency until after World War II. The earliest reference I have found is in John Burns' 1949 *Lucifer with a Book*, whose characters "come out of the cloister" and into the life.¹² Thus, the idea of coming out of the cloister began as a metaphor for a homosexual's entry into the underground gay subculture, not unlike the "coming out" of a debutante into society.¹³ The 1950s invoked the closet as the place where private skeletons and personal secrets are hidden.¹⁴ By the 1960s some gay people were using "coming out" as an expression for the homosexual's sharing her or his own private skeleton in the closet with straight people. Whereas homosexuals confronted the possibility of coming out of the closet, some heterosexuals were obsessed with casting them out. To fight against "homosexual recruiting of youth," Florida's Legislative Investigation Committee wrote in 1964, "the closet door must be thrown open and the light of public understanding cast upon homosexuality."¹⁵

These references (there are many others) illustrate not only how slowly the vocabulary of the closet was worked out, but also how the closet can be either *protective* or *threatening*.¹⁶ For the homosexual, it could be an embracing even if temporary cocoon, or it could be a scary prison. For heterosexuals, the closet likewise could have two different kinds of meanings, either a place where skeletons are se-

11. See EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* (1990); Robert Dawidoff, *In My Father's House Are Many Closets*, in CHRISTOPHER STREET, Apr. 1989, at 28-41.

12. ROGER AUSTEN, *PLAYING THE GAME: THE HOMOSEXUAL NOVEL IN AMERICA* 110 (1977) (quoting John Burns discussing *Lucifer with a Book*). The central character, Guy Hudson, is a boys' school instructor of intense but ambiguous sexuality. The only clue to his preferences is a lewd Renaissance print of a man having sex with another man and a woman. This print is stored in Hudson's dormitory closet. See JOHN HORNE BURNS, *LUCIFER WITH A BOOK* 105-06 (1949). Other characters make homosexual advances to Hudson by seeking to bring the print out of the closet. See, e.g., *id.* at 132-33.

13. See GORE VIDAL, *THE CITY AND THE PILLAR* 154 (rev. ed. 1965). "I've been invited to a faggot party," matinee idol Ronald Shaw told Jim Willard. "I'll take you. It can be your coming-out party in New York." *Id.*

14. See Marlin Prentiss, *Are Homosexuals Security Risks?*, ONE, Dec. 1955, at 4. Prentiss explained the ironies of denying homosexuals security clearances: "for where among us breathes there a man—or woman—who does not have his own personal Achilles heel—his own private skeleton in the closet?" *Id.*

15. FLA. LEGIS. INVESTIGATION COMM., *HOMOSEXUALITY AND CITIZENSHIP IN FLORIDA* 14 (1964) (available at Fla. Dep't of State, Div. of Archives, ser. 1486, carton 1, Tallahassee, Fla.).

16. See Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1794-1802 (1996).

cluded from view so that they do not disturb household harmony or, more sinisterly, a place within the home where lurk creatures who could break out and wreak havoc. Providing a spatial analogue to Bullitt's Achilles heel metaphor, Kenji Yoshino likens the Trojan Horse to such a closet.¹⁷ The theme of this Article is how post-World War II American law helped create the closet and how the closet's meaning evolved—from threatening to protective for heterosexuals at the same time it was changing from protective to threatening for homosexuals.

The closet took form as a response to three legal conundrums in the 1940s and 1950s: the increasing use of sexual orientation as an important regulatory category, which contributed to an obsessional discourse about minority sexual orientation; the insistence of legal republicans to command state apparatus to hunt down and destroy deviant minorities, especially homosexuals, countered by the insistence of legal libertarians that homosexuals should be left alone; and the conflicting desires of homosexuals to hide behind traditional libertarian barricades while at the same time becoming more inclined to make their presence known in republican public culture. People of minority sexual orientations hid in the closet for reasons of both terror (to avoid annihilation) and social accommodation (to pay the price of toleration). But whereas homosexuals before 1940 were reflexively willing to segregate their double lives and keep their gay one a secret, those after World War II were more ambivalent about the segregation, and some openly violated it. Conversely, heterosexuals before World War II were generally willing to let secret homosexual lives pass unnoticed, but after the war found the secret lives more threatening and sought to expose them. The idea of the closet, therefore, is not just the idea that homosexuality must be secret; that was entailed in the double life. What is distinctive about the political economy of the closet is that both homosexuals and heterosexuals regarded the secrecy with ambivalence. All of us were attracted both to the idea of keeping homosexuality hidden and to the opposite idea that the closet door must be thrown open and homosexuality exposed to view and discussion.

The object of this Article is to explore the legal regulation of same-sex intimacy between 1946 and 1961 from the perspective of the closet. Although the Article seeks to explore national phenomena, much of its narrative will focus on Florida as a microcosm of the larger story.¹⁸ Part I traces in detail the regulatory moves made by

17. See generally Kenji Yoshino, *The Trojan Horse and AIDS* (Feb. 1996) (Yale Law School essay, on file with author) (drawing from Monique Wittig, *The Trojan Horse*, in *ESSAYS ON WOMAN* (Lucy Gelber & Romaeus Leuven eds., Freda Mary Oben trans., 1987)).

18. I focus on Florida partly because its anti-homosexual terror is so well documented; the Johns Committee papers are available at the Florida Archives. I also focus on

an America fearful, as Bullitt and Hoover were, of these skeletons in its closet, seemingly determined not only to deny homosexuals any public space, but also to pry them out of their closets and erase them. Part II explores the failure of this regulatory effort, thwarted in part by doctors, prosecutors, and trial judges who worked from the premises of privacy jurisprudence and offered the mutually protective closet as a compromise: we won't ask about your sexuality, you don't tell us about it. Both witch-hunters like Joe McCarthy (Part I) and tolerant liberals like Learned Hand (Part II) contributed in the 1950s to an *apartheid of the closet*. This was a regime in which homosexuals were segregated from civilized society, not physically, but psychically and morally. So long as they confined their expressions and actions to a mutually protective closet, homosexuals were promised a regime of "separate but equal" toleration from the liberals and legal protection from the witch hunters.

Just as racial apartheid was an unstable regime, however, so too was the apartheid of the closet, as I explore in Part III. From conventional society's point of view, there were always those who viewed the closet as threatening, containing predatory enemies. From the homophile point of view, the closet was always a confinement—really a badge of inferiority—as well as a refuge, and straight society's tendency to pry open the closet door left the homosexual with the worst of both worlds: neither privacy nor integrity. The never-ending masquerade of the closet made it impossible for the homosexual to have integrity, and yielded a self-fulfilling prophecy whereby homosexuals were persecuted, in part, because they were untrustworthy and susceptible to blackmail, precisely the charges leveled against Sumner Welles by Bullitt.

Law contributed critically to the failure of the mutually protective closet. While the efforts of the witch hunters certainly contributed to the persuasiveness of liberals' mutually protective closet, they also destabilized it by their episodic successes, which came irregularly and unexpectedly. Also, appellate judges typically acquiesced in the terror when push came to shove, making the mutually protective closet less credible. Not least important, the ability of the witch hunters to "out" people created a class of citizens who were already excluded from the mutually protective closet and therefore inclined to be critical and destabilizing. In short, the privacy jurisprudence of

Florida partly because it is so diverse—being a southern state that even in the 1950s had big (Dade County and Miami/Miami Beach) and medium-sized metropolitan areas (Hillsborough County and Tampa) as well as rural areas (northern part of the state). Nestled in traditionalist rural upstate are two university communities, Florida State University and the University of Florida. Because they had noticeable homosexual populations surrounded by traditionalist peoples, the university towns and the metropolitan areas became situses of homosexual/traditionalist culture clashes.

the 1950s gave homosexuals a security that they soon questioned, and extracted from them a dishonesty that became increasingly intolerable.

The success of free speech jurisprudence in the 1950s was also destabilizing to the mutually protective closet. Developed in response to the state's effort to suppress political and civil rights dissidents (namely, Communists and African-Americans), free speech jurisprudence became a means by which sexual and gender dissidents (such as homosexuals and cross-dressers) could claim public space for themselves. The American free speech tradition then being created was in favor of robust debate, and in the sexual sphere that debate helped create a homosexual "minority." Homophile publications, from the Kinsey reports to lesbian pulp romances, were the first evidence many gay people had that they were not accidental monsters. Homophile suppression, from the armed forces' exclusion of homosexuals to censorship campaigns, helped make sexual deviance sexy to untold numbers of Americans whose homoerotic impulses were stirred and sometimes awakened by the orgasmic hysteria of the witch hunters.

I. TERROR: THE STRAIGHT-THREATENING CLOSET

Following World War II, conventional society sought to eliminate homosexuality in the United States. Earlier, popular consciousness had designated the homosexual a focal point for American anxieties about sex, feminism, and gender.¹⁹ In the mainstream imagination, the homosexual stereotypes of the mannish dyke and the effeminate fairy combined unspeakable sexual perversion and transgression of gender roles with moral and psychological degeneracy. Some people believed homosexuals ascertainable by stigmas such as derangement, gender-crossing manner or attire, or physical deformity. Some psychiatrists diagnosed homosexuals as "sociopathic" or "psychopathic" personalities and deemed them incapable of controlling their sexuality. The concept of the predatory homosexual crystallized as an *idée fixe* of the homosexual as beyond self-control and thus an assured child molester. The 1930s witnessed a homosexual panic in many urbanized states that had sizable homosexual subcultures, particularly New York, California, New Jersey, Pennsylvania, Michigan, and Ohio. World War II interrupted this panic but laid the foundation for its subsequent intensification.²⁰

19. See William N. Eskridge, Jr., *Law and the Construction of the Homosexual: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. (forthcoming 1997); Estelle Freedman, "Uncontrolled Desires": *The Response to the Sexual Psychopath, 1920-1960*, 74 J. AM. HIST. 83, 85-86 (1987).

20. See generally ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE* (1992) (discussing gay American soldiers in World War II); JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL*

The War created unprecedented economic opportunities for women, including large-scale service in the military, and threw men as well as women into same-sex settings for extended periods. With the absence of male companions on the homefront, women formed close, and sometimes erotic, relationships with one another. Servicemen likewise turned to one another for sexual companionship. Thus, World War II facilitated the abandonment of traditional gender and sex roles previously considered sacrosanct, and fueled the postwar expansion of homosexual urban subcultures. Although aware of the deviation, the state frequently looked the other way or handled situations with leniency. After the war, however, both society and the state responded more harshly. Reacting to a period of sexual experimentation and gender bending, America renormalized with a vengeance. Government reaffirmed and protected traditional gender roles and severely stigmatized deviance from heterosexuality. The postwar baby boom confirmed societal subscription to traditional heterosexual roles and helped erase memories of wartime aberrations. Many attracted to the same sex retreated to what soon came to be known as the closet, sometimes even marrying a member of the opposite sex. Thus, for the homosexual, the postwar closet could serve as a potential refuge.

The state destabilized the potential equilibrium whereby homosexuals would hide in the closet in exchange for society's promise not to open the door. Many anti-homosexual Americans, including closeted homosexuals,²¹ viewed the closet as a Trojan Horse whose secluded occupants were a fifth column threatening to destroy the United States, morally and politically. As Florida's Legislative Investigation Committee wrote in 1964, "if we don't stand up and start fighting, we are going to lose these battles in a very real war of morality."²² The anti-homosexuals mobilized the forces of state power in the 1950s to "throw open" the "closet door" (as the Committee put it) and to destroy homosexuality before it destroyed the country. Homosexual panic thus paralleled Communist panic, and the two intermixed, during which charges of homosexuality were confused with or

COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970 (1983) (discussing the history of homosexuality in American Society); George Chauncey, Jr., *The Postwar Sex Crime Panic*, in TRUE STORIES FROM THE AMERICAN PAST 160 (William Graebner ed., 1993) (discussing the "sex crime panic" that occurred after World War II).

21. See, e.g., DAVID M. OSHINSKY, A CONSPIRACY SO IMMENSE: THE WORLD OF JOE MCCARTHY 310-11, 328-29 (1983) (reactionary Senator McCarthy, long a bachelor, rumored to be homosexual); NICHOLAS VON HOFFMAN, CITIZEN COHN (1988) (McCarthy's chief counsel Roy Cohn was a closeted homosexual); ANTHONY SUMMERS, OFFICIAL AND CONFIDENTIAL: THE SECRET LIFE OF J. EDGAR HOOVER (1993) (FBI Director Hoover was a cross-dresser and possible homosexual; his only emotionally intimate relationship was with his longtime companion Clyde Tolson).

22. FLA. LEGIS. INVESTIGATION COMM., *supra* note 15, at 13.

even dominated charges of political subversion. Even more than the despised Communists, homosexuals were like the "pod people" in Don Siegel's 1950s movie *The Invasion of the Body Snatchers*: they were weird aliens who could pass as humans and whose goal was to prey on Americans and turn them into pod people. Even more than conquest by an external enemy, the American nightmare of the 1950s was conquest from within—a nation of pod people (homosexuals) who had taken over the bodies of real people (heterosexuals). As a consequence of that fear, the homosexual's closet became her prison, a place where she was forced to be but which could be invaded at any time by state officers who could erase her at their whim.

This systematic regulation operated differently on women than on men. Although lesbians were increasingly subjected to criminal arrests in the 1950s, most criminal laws were largely enforced against male homosexuals, for they socialized more publicly and engaged in more open sexual solicitations. An exception to this generalization were laws against cross-dressing, which were used as an excuse for police to harass butch lesbians. Also, lesbians, like gay men, suffered when their bars and social spaces were harassed by raiding vice squads or the liquor regulatory gendarmerie. Although they were less likely to be arrested, the collateral civil consequences of arrest operated more severely on lesbians, who were more vulnerable to loss of jobs or even children because of sexual allegations. Women employed in the military were most severely harmed by the armed forces' homosexual exclusion because it interacted with and reinforced male personnel's hostility toward women who performed traditionally male occupations. The suppression of homosexual ideas and culture affected both men and women, but also may have had a disproportionate effect on straight as well as lesbian women because it deprived women of important feminist ideas, literature, and role models.

A. Criminal Law: Hunting the Homosexual

A comprehensive criminal regime for regulating sexual intimacy was in place well before World War II.²³ Nineteenth-century state laws prohibiting sodomy, public lewdness, and indecency were readily applicable to same-sex intimacy, and every state had such statutes by 1946. Most states and municipalities also had anti-prostitution laws

23. See *infra* Appendix 2A. This chart displays the rich array of state felonies, state misdemeanors, and municipal offenses regulating citizens of San Francisco, California, in 1950. Although this list is longer than those facing residents of states and cities with less sexual diversity than California and San Francisco, it reflects the comprehensive manner in which state and local governments regulated sexuality in the postwar period.

that prohibited lewd vagrancy, disorderly conduct, or sexual solicitation. These laws were applied to homosexuals and were sometimes updated to target rather than simply include sexual deviants. Additionally, many municipalities and a few states such as New York and California prohibited cross-dressing. Such laws were deployed against butch lesbians and female impersonators who appeared in public.

With soldiers (mostly men) and civilians (mostly women) thrust into homosocial environments with intense emotional bonding, World War II created unprecedented opportunities for same-sex intimacy.²⁴ Many Americans, exposed to homosexual intimacy during the war, flocked to urban subcultures that existed before the war but flourished afterwards. The increased prominence of gay subcultures developed as America was renormalizing around the breadwinner-husband/housekeeper-wife-based family, and an anti-homosexual reaction ensued that lasted half a generation. Continuing a trend pronounced before World War II, criminal regulation focused on the sexual psychopath and child molester; the homosexual epitomized both demons. Reacting against the temporary aberrations tolerated during World War II, the criminal law aggressively hunted the homosexual. In many jurisdictions where homosexual subcultures had been prominent before the war, elaborate bureaucracies and vice squads carried out ambitious efforts to suppress homosexuality more systematically. In many jurisdictions where such subcultures had not been prominent until after the war, anti-homosexual "witch hunts" allowed communities to act out their synergistic concerns with children's sexuality, sexual deviation, and male aggression.

1. *Laws to Suppress and Erase the Sex Pervert*

In the mid-twentieth century, the District of Columbia (District) possessed a schizophrenic character: on the one hand it had a long-standing and thriving gay subculture, but on the other it was a sleepy southern city whose subculture could not compare with that of New York or Los Angeles. At war's end, the District regulated sexual perversion by criminalizing public indecent exposure, "inviting" persons for immoral purposes, and public disorderly conduct.²⁵ Police arrested or detained scores of men each year for sexual overtures pursuant to these statutes and for common-law sodomy, yet the postwar Congress, and many state legislatures, found this degree of

24. See D'EMILIO, *supra* note 20, at 24-25.

25. D.C. CODE ANN. § 22-2701 (1940) (inviting for purposes of public prostitution); see also *id.* § 22-1107 (unlawful assembly, profane and indecent language); *id.* § 22-1112 (indecent exposure); cf. S. REP. NO. 1377 (1948), reprinted in 1948 U.S.C.C.A.N. 1714, 1715-16 (summarizing pre-1948 D.C. law).

regulation insufficient. The congressional response reflected similar moves by state legislatures all over the country. All these bodies were awakened to the threat of homosexuals to the nation's perceived security.

To begin with, sexual offense laws had holes that Congress plugged after the war. Unlike the states, the District had no law prohibiting anal or oral sex. Originally, the District police used their common-law authority to arrest men on sodomy charges, but in 1948 Congress enacted the Miller Act²⁶ to remedy problems with the common law. The impetus for the Miller Act was not concern for just sodomy, but child molestation. Estelle Freedman has documented the course of the nation's mania concerning child molestation, which commenced in the 1930s and reemerged with a vengeance after World War II.²⁷ Characteristically, FBI Director J. Edgar Hoover fanned much of the hysteria. In his article, *How Safe Is Your Daughter?*, Hoover observed that "[t]he most rapidly increasing type of crime is that perpetrated by degenerate sex offenders."²⁸ He continued, chillingly: "Should wild beasts break out of circus cages, a whole city would be mobilized instantly. But depraved human beings, more savage than beasts, are permitted to rove America almost at will."²⁹ The press fanned these flames, and although stories like Hoover's pointed to molestation of girls, "girl-molesting sex pervert" melded in the popular imagination with "boy-molesting sex pervert." Consequently, police attention focused disproportionately on homosexual men even when victims of sex crimes were girls.³⁰

Consistent with these concerns, the Miller Act's new sodomy provision carried a higher penalty—incarceration up to twenty rather than ten years—if the sodomy victim was younger than sixteen years of age.³¹ In addition, the statute created new crimes of indecent exposure to children of either sex younger than age sixteen and "indecent liberties" with such children.³² These changes reflected the heightened fear that homosexual adults turned children into homo-

26. Ch. 428, 62 Stat. 346 (1948).

27. See Freedman, *supra* note 19; see also Chauncey, *supra* note 20.

28. J. Edgar Hoover, *How Safe Is Your Daughter?*, AM. MAGAZINE, July 1947, at 32.

29. *Id.*

30. See Freedman, *supra* note 19, at 94. The article discusses this 1946 letter from one homosexual man to another after a child murder in Chicago:

I suppose you read about the kidnapping and killing of the little girl in Chicago—I noticed tonight that they "thought" (in their damn self-righteous way) that perhaps a pervert had done it and they rounded up all the females [effeminate homosexuals]—they blame us for everything and incidentally it is more in the limelight everyday—why they don't round us all up and kill us I don't know.

Id.

31. See Miller Act § 101, 62 Stat. at 346 (repealed 1995).

32. *Id.* §§ 101, 103, 62 Stat. at 346, 347 (repealed 1995).

sexuals not only by sodomizing them, but also by taking other sexual liberties with them. Following Congress' lead, many states similarly revised their sodomy laws to impose more significant penalties on homosexuals who committed sodomy or other "lewd" conduct with minors.³³ From the 1940s through the early 1960s, no fewer than twelve states enacted statutes criminalizing the taking of indecent liberties or engaging in lewd behavior with children under specified ages.³⁴ In 1943, Florida designated it a felony to fondle a girl younger than age fourteen "in a lewd, lascivious or indecent manner,"³⁵ and in 1951 (at the apex of the anti-homosexual terror), expanded the felony to include the lewd fondling of a boy under age fourteen.³⁶ Like the Miller Act, Florida's child molestation statutes reflected not only a concern that children's sexuality be protected, but also the belief that sexual corruption could occur beyond vaginal, anal, and oral intercourse.

The biggest perceived failure of sex offender laws was that the states had no comprehensive plan to deal with the offender after his arrest. Usually perpetrators paid a fine or served a short jail sentence. Before World War II, Illinois, Michigan, Minnesota, and California enacted special laws for treatment of "sexual psychopaths," which the Supreme Court provisionally upheld in 1940.³⁷ The Miller Act's Title II included a "sexual psychopath" provision, essentially adapted from the Minnesota statute.³⁸ Under this law, a U.S. Attorney's office could bring a proceeding against a person believed to be a sexual psychopath, which was defined as

a person, not insane, who by a course of repeated misconduct in sexual matters has evidenced such lack of power to control his or her sexual impulses as to be dangerous to other persons because

33. See, e.g., CAL. PENAL CODE § 288 (West 1956) (repealed 1976) (authorizing a life sentence for any defendant who performs anal or oral sex with children under the age of 14).

34. Arizona, Delaware, Georgia, Idaho, Illinois, Kentucky, Louisiana, Minnesota, Missouri, North Carolina, Texas, and Washington. Typical of these was an enactment by the Texas Legislature:

[W]hoever shall use his mouth on the sexual parts of another human being for the purpose of having carnal copulation, or who shall voluntarily permit the use of his own sexual parts in a lewd or lascivious manner by any minor, . . . shall be confined in the penitentiary or not less than two (2) nor more than fifteen (15) years.

Act effective Aug. 9, 1943, ch. 112, § 1, 1943 Tex. Gen. Laws 194, 194 (West) (repealed 1983).

35. Act effective June 10, 1943, ch. 21974, § 1, 1943 Fla. Laws 583, 583-84 (current version at FLA. STAT. § 800.04 (1995)).

36. See Act effective May 11, 1951, ch. 26580, § 1, 1951 Fla. Laws 234, 234.

37. See *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 277 (1940) (upholding Minnesota's law against "psychopathic personalities"). For a list of these and other sexual psychopath statutes enacted by 1961, see *infra* Appendix 4.

38. See Miller Act, ch. 428, §§ 201-208, 62 Stat. 346, 347-50 (1948).

he or she is likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his or her desire.³⁹

If determined to be a sexual psychopath, "the court shall commit him or her to an institution to be confined there until . . . an appropriate supervisory official finds that he or she has sufficiently recovered so as to not be dangerous to other persons."⁴⁰ If originally charged with a crime, the defendant then faced criminal proceedings upon discharge.

Statutes regulating or just studying sexual offenders constituted a national craze after World War II. Eleven states established legislative study commissions to evaluate existing laws applicable to sex offenders and to suggest statutory changes.⁴¹ Reports from California, Illinois, New Jersey, and New York pessimistically suggested that these statutes did not contribute anything to the war against child molestation.⁴² This caused the anti-homosexual craze to subside. Nonetheless, by the late 1950s, laws providing indeterminate sentences and psychiatric treatment for sex offenders had been adopted in the District and twenty-seven states, including all the urbanized jurisdictions of the East and West Coasts and the Midwest.⁴³ The District's statute represented others with few exceptions. Only five jurisdictions followed Congress in allowing such proceedings to be brought without a pending criminal charge, while most required

39. D.C. CODE ANN. § 22-3503(1) (1948).

40. *Id.* § 22-3508.

41. See CAL. DEPT OF MENTAL HYGIENE, FINAL REPORT ON CALIFORNIA SEXUAL DEVIATION RESEARCH (1954); FLA. LEGIS. INVESTIGATION COMM., *supra* note 15; ILL. COMM'N ON SEX OFFENDERS, REPORT OF THE ILLINOIS COMMISSION ON SEX OFFENDERS TO THE 68TH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS (1953); GOV.'S STUDY COMM'N ON THE DEVIATED CRIMINAL SEX OFFENDER, REPORT (Mich. 1951); MINN. LEGIS. INTERIM COMM'N ON PUB. WELFARE LAWS, SEX PSYCHOPATH LAWS REPORT (1959); INTERIM COMM'N OF THE STATE OF NEW HAMPSHIRE TO STUDY THE CAUSE AND PREVENTION OF SERIOUS SEX CRIMES, REPORT (1949); PAUL W. TAPPAN, N.J. COMM'N ON THE HABITUAL SEX OFFENDER, THE HABITUAL SEX OFFENDER: REPORT AND RECOMMENDATIONS OF THE COMMISSION ON THE HABITUAL SEX OFFENDER (1953); BERNARD C. GLUECK, RESEARCH PROJECT FOR THE STUDY AND TREATMENT OF PERSONS CONVICTED OF CRIMES INVOLVING SEXUAL ABERRATIONS, FINAL REPORT (1955) (New York) [hereinafter N.Y. RESEARCH PROJECT]; OR. LEGIS. INTERIM COMM. TO STUDY SEX CRIME PREVENTION, REPORT (1956); JOINT STATE GOV'T COMM'N TO THE GEN. ASSEMBLY OF THE COMMONW. OF PA., SEX OFFENDERS: A REPORT OF THE JOINT STATE GOVERNMENT COMMISSION TO THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA (1951); COMM'N TO STUDY SEX OFFENSES TO THE GOV. AND THE GEN. ASSEMBLY OF VA., THE SEX OFFENDER AND THE CRIMINAL LAW (1951) (all on file with author).

42. See CAL. DEPT OF MENTAL HYGIENE, *supra* note 41; ILL. COMM'N ON SEX OFFENDER, *supra* note 41; N.J. COMM'N ON THE HABITUAL SEX OFFENDER, *supra* note 41; N.Y. RESEARCH PROJECT, *supra* note 41.

43. See *infra* Appendix 4; Karl M. Bowman & Bernice Engle, *Synopses of Special Sex Psychopath Laws—United States*, in CAL. DEPT OF MENTAL HYGIENE, *supra* note 41, at 41; Alan A. Swanson, *Sexual Psychopath Statutes: Summary and Analysis*, 21 CRIM. L. COMMENTS AND ABSTRACTS 215 (1960).

conviction of a sex offense.⁴⁴ Few jurisdictions provided as many procedural guarantees as Congress.⁴⁵ Although the child molestation panic operated to justify sexual psychopath laws, and states like Florida limited their statutes to sex crimes involving children,⁴⁶ the District and other states did not so limit their laws.⁴⁷ In practice, these laws were typically applied to relatively minor criminals, not rapists or child molesters. Paul Tappan, author of the celebrated *New Jersey Report and Recommendations of the Commission on the Habitual Sex Offender*, found that the first adjudications of sexual psychopaths involved crimes such as solitary but public masturbation, the following of a white woman by a person of color, and the passing of bad checks by a passive homosexual.⁴⁸ Almost half of the first 100 sexual psychopaths adjudicated in New Jersey were convicted of lewdness (homosexual overtures), sodomy, and fellatio.⁴⁹

Whereas sodomy and other criminal laws aspired to keep homosexuals in the closet, the sexual psychopath laws aspired to force homosexuals out in order to eradicate them. The earlier laws discouraged "latent" homosexuals from acting on their "homosexual tendencies" and brought the "overt" homosexual into the criminal justice system. But the sexual psychopath laws assured that overt, and sometimes even latent, homosexuals would be separated from society until they were "cured." Over the dissents of experts such as Dr. Alfred Kinsey, some doctors reassured the authors of such statutes that homosexuals could be cured through methods such as psychotherapy, aversion therapy (electric shocks delivered to the brain), pharmacological shock (induced vomiting when exposed to homoerotic images), injection of hormones, cerebral lobotomies, and castration.⁵⁰ Except for castration, these methods were deployed, irregularly, in American hospitals for treatment of homosexuals involuntarily committed by their families or the state.⁵¹

44. See *infra* Appendix 4. Sixteen statutes required that the offender be convicted of some crime or of a specific sex crime before holding a sexual psychopath hearing. See *id.* Seven statutes required that the offender be charged with some crime or a specific sex crime. See *id.*

45. See Swanson, *supra* note 43, at 217-18. Most jurisdictions did not permit the defendant to opt for a jury trial or guarantee the defendant counsel or other assurances of criminal process. See *id.* Some jurisdictions did not even conduct a judicial hearing and committed people simply on the basis of medical affidavits. See *id.*

46. See FLA. STAT. § 800.04 (1949) (targeting defendants convicted of sodomy (the "crime against nature"), lewdness, rape, and attempts to commit those crimes when children are the victims).

47. See *infra* Appendix 4.

48. See TAPPAN, *supra* note 41, at 28-29.

49. See *id.*

50. See JONATHAN KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.* 134-207 (1976) (containing copies of graphic original documents and descriptions of anti-homosexual medical procedures and treatment).

51. See *id.*

The most famous of the treatment institutions was California's Atascadero State Hospital, which opened in 1954.⁵² About sixty percent of the inmate population were sex offenders, including many convicted of consensual adult sodomy or oral copulation. At the beginning, the institution was relatively relaxed, even if ineffective in "curing" those incarcerated there. Key to the institution was controlling inmates resistant to treatment or authority. Doctors performed a steady but small stream of lobotomies, which Dr. Walter Freeman testified helped patients lose "their fear and hate and become noticeably friendly."⁵³ The main treatment, which Atascadero pioneered, involved the drug succinylchloride (Anectine), a "muscle relaxant which makes the victim unable to breathe. He feels like he's dying. And while he lies there unable to breathe, but fully conscious, the 'therapist' tells him that unless he's a good boy, and quits jerking off in the shower, or whatever, he *will* die."⁵⁴ This drug was used continually at Atascadero until 1969, when a visiting law student raised a scandal about its use. Some inmates were incarcerated here for only a short time, others for decades.

Registration statutes operated as another widely deployed strategy for exposing the homosexual. Like many other municipalities, Los Angeles required "convicted persons" remaining in the city for more than five days to register with the chief of police.⁵⁵ Registration required convicted persons to provide details of their crimes and all relevant information as to their whereabouts while in Los Angeles.⁵⁶ Later, Los Angeles required the registration of all sex criminals, including those convicted of consensual anal or oral sex and lewd vagrancy, a misdemeanor.⁵⁷ This requirement greatly expanded the ambit of registration because each year hundreds of people were charged with lewd vagrancy. In 1947, California enacted a statewide registration for sex offenders patterned after the Los Angeles Municipal Registration Law.⁵⁸ In 1951 and 1952, Congress considered

52. The account that follows is drawn from exposes of Atascadero in the early 1970s. See John LaStala, *Atascadero: Dachau for Queers?*, THE ADVOCATE, Apr. 26, 1972, at 11, 13 (LaStala was an inmate in 1955); Rob Cole, *Inside Atascadero IV: Life, Liberty, and the Pursuit of Treatment*, THE ADVOCATE, Oct. 11, 1972, at 5.

53. LaStala, *supra* note 52, at 11 (quoting Dr. Walter Freedman).

54. *Id.* at 13.

55. See LOS ANGELES, CAL., CODE ch. V, § 52.39(a) (1955).

56. See *id.* A convicted person who changed residences was required to notify the chief of police. See *id.* § 52.40.

57. See *id.* § 52.38(d). This section also provided that one was a "convicted person" if after 1945 the person was "convicted in any place other than the State of California of any offense which, if committed in this State, would have been punishable" under the lewd vagrancy law. *Id.*; see also CAL. PENAL CODE § 647(5) (1955) (lewd vagrancy law).

58. See Act effective Sept. 19, 1947, ch. 1124, 1947 Cal. Stat. 256.2 (codified as amended at CAL. PENAL CODE § 290 (West Supp. 1996)). The 1947 registration law was amended in 1949 and 1950 to target an expanded array of sex offenders, including those convicted of lewd vagrancy.

bills requiring the national registration of sex offenders but failed to enact them.⁵⁹ The use of registration in California and other jurisdictions heightened the consequences of being out of the closet: public notoriety and perpetual wardship under the baleful eyes of the police.

Even after the Miller Act, the District's laws effectively regulated only public and not private same-sex intimacy. In 1953, in a move that reflected a more fearful understanding of the closet, Congress rewrote the District's indecent exposure law to make it unlawful "to make any obscene or indecent exposure of his or her person, or to make any lewd, obscene, or indecent sexual proposal, or to commit any other lewd, obscene, or indecent act in the District of Columbia."⁶⁰ Congress intended to assure criminal prosecution of homosexual acts anywhere in the District by removing the public place requirement for indecency, lewdness, or lewd sexual solicitation.⁶¹ By 1961, twenty-one states had removed public place requirements from their lewdness or indecency statutes.⁶² As a result, it became a crime throughout most of the United States not only to engage in consensual sodomy in a private place, but also to suggest or propose such an idea. Many asked, how did the state expect to enforce laws against private same-sex intimacy?

2. *Flushing Out the Homosexual: Spies, Decoy Cops, Raids*

Most crimes come to the attention of the criminal justice system through complaints by victims, but homosexual intercourse, like prostitution, is often a crime without a complainant. For laws against consensual same-sex intimacy to be enforced, the state must effectively, as well as formally, become the complainant. When the intimacy is not displayed in public view, the state can choose to take affirmative and aggressive measures to observe the homosexual acts. New York City's private anti-prostitution groups, assisted by its municipal police force, became the model for proactive state enforcement. Before World War II, these groups had concentrated on luring homosexuals into compromising propositions in toilets, parks, and theaters. Other cities acted similarly.

59. See *Are You or Have You Ever Been a Homosexual?* ONE, Apr. 1953, at 5-8.

60. Act of June 29, 1953, ch. 159, § 202(a)(1), 67 Stat. 90, 92 (codified at D.C. CODE ANN. § 22-1112(a) (1996)).

61. See H.R. REP. NO. 82-538, at 19 (1951); H.R. REP. NO. 83-514, at 4 (1953); see also 99 CONG. REC. 6207 (1953).

62. Those states were Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Kentucky, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, and Wyoming. See Note, *Private Consensual Homosexual Behavior: The Crime and Its Enforcement*, 70 YALE L.J. 623, 635 app. (1960) (listing statutes).

The period after World War II, therefore, did not innovate aggressive police tactics but did much to regularize and modernize them. Regulation came in most cities through the creation or reconfiguration of police department vice or morals squads. Vice squads consisted of officers committed to ferreting out sex crimes, and their productivity was measured by the number of prostitutes and homosexuals arrested. For example, in 1949, Philadelphia created its morals squad, and in its first year of operation, sodomy or solicitation of sodomy comprised almost sixty percent of the squad's arrests.⁶³ The exact operation of vice squads varied from city to city. Vice squads in larger cities frequently consisted of dozens of officers that formed several divisions within police departments. Usually, these cities had more resources to spend on police in general and thus expressed greater alarm at the marked increase in open homosexuality. In smaller cities, vice operations were carried out through smaller clusters of officers.⁶⁴

Anal or oral sex represented the most serious felonies for which a homosexual might be charged.⁶⁵ These charges typically involved a complainant when the intercourse resulted from force, intoxication, or relations between an adult and a minor.⁶⁶ Conversely, consensual adult intercourse often generated no complainant, or the complainant was a police officer, and so the police relied on their own observation.⁶⁷ Police regularly surveyed public cruising areas frequented

63. See BUREAU OF POLICE, CITY OF PHILADELPHIA, ANNUAL REPORT 31 (1950) (listing 514 total arrests, including 287 arrests for sodomy or solicitation, 49 for rape and indecent assault, 31 for public indecency, and 28 for crimes with minors); cf. LOS ANGELES POLICE DEPT., 1952 ANNUAL REPORT 33 (listing 10,321 total arrests for 1952, including 1689 for "sex perversion" and 2087 for prostitution).

64. See Dal McIntire, *Tangents*, ONE, Feb. 1956, at 12. Portland's "Buster Squad," for example, specialized in breaking up "rings" of men having sex with boys.

65. See Jon J. Gallo et al., *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 UCLA L. REV. 643 (1966) (studying Los Angeles County arrests and prosecutions). This article is considered to be the most detailed study of police enforcement techniques during this period.

66. See *infra* Appendix 1B.

67. See, e.g., *People v. Spaulding*, 254 P. 614, 615 (Cal. Dist. Ct. App. 1927) ("[M]erely engaging in a scheme for the purpose of detecting, exposing, and punishing crime does not constitute one an accomplice."). Decoys were inappropriate for enforcing the serious felonies, because the law required penetration. Hence, the officer would not be able to obtain evidence without becoming an accomplice in the forbidden act, i.e., inserting his penis in the defendant or receiving the defendant's penis in him.

Consider the following arrest and complaint figures for sex crimes in New York City for 1958-1966, compiled from the New York City Police Department's annual reports:

	<i>Arrests (Complaints)</i> <i>Non-Rape Sex Felonies</i>	<i>Arrests (Complaints)</i> <i>Sex Misdemeanors</i>	<i>Arrests (Complaints)</i> <i>Sex Offenses/Degenerates</i>
1958	419 (468)	2103 (2693)	1142 (776)
1959	475 (494)	2206 (2845)	937 (642)
1960	436 (476)	2341 (2829)	714 (483)
1961	443 (468)	2313 (2800)	790 (567)
1962	425 (447)	2464 (2838)	775 (563)

by men: bars, restrooms, subways, parking lots, steam baths, and beaches.⁶⁸ In the larger cities, officers maintained stakeouts to view intercourse from hidden observation posts.⁶⁹ Two police officers typically huddled in or above a toilet booth and watched oral intercourse by men in adjoining booths.⁷⁰ Later, police escaped the stench of the latrine through use of surveillance cameras. Furtive observation of public restrooms—or tearooms as they were called by denizens—had been New York City's standard sodomy enforcement technique since the turn of the century. As the century wore on, many cities engaged in similar practices. Modest-sized cities as diverse as Palo Alto, California; Oklahoma City, Oklahoma; and Ann Arbor, Michigan netted scores of "perverts" by staking out public restrooms.⁷¹

A more complicated *modus operandi* involved police observation of suspicious conduct between two men. Upon observance of suspicious conduct, the police followed and spied on the men until they observed illegal activity. In one case, Officers Grimm and Beaudry of the San Diego vice squad observed Eldridge Rhodes, a black man suspected of propositioning servicemen, walking with Thomas Earl, a white man.⁷² The police followed the suspects to a hotel. When the men went inside a room, the police listened outside until they heard the sounds of kissing and a squeaking bed. Grimm then peeked through an opening allegedly left by the cracked door and witnessed the men naked and embracing on the bed. Assisted by a hand-hold from Beaudry, Grimm then looked through the glass transom above the door. Beaudry used a stool to observe. Grimm witnessed the commission of a felony, oral sex. The officers intrepidly broke into

1963	430 (NA)	2332 (NA)	892 (NA)
1964	433 (434)	2266 (2288)	760 (669)
1965	440 (456)	2256 (2834)	799 (749)
1966	425 (517)	2275 (3856)	363 (402)

"Non-Rape Sex Felonies" included forcible sodomy and sodomy with a minor; "Sex Misdemeanors" included consensual sodomy; "Sex Offenses/Degenerates" included homosexual overtures only. Note that there were usually many more "degeneracy" arrests than complainants.

68. See Gallo et al., *supra* note 65, at 707 n.138. This study examined 493 felony arrests against men having sex in the following locales: public restrooms, 274; vehicles, 108; private residences, 24; jail, 18; public parks, 17; steam baths, 15; public beaches, 11; other or unknown, 26. See *id.*

69. See *id.* at 707-09.

70. See *id.*

71. See Dal McIntire, *Tangents*, ONE, Apr.-May 1956, at 14 (noting that a Palo Alto police stakeout of a depot restroom netted 23 men, including seven Stanford students and a teacher, and charged eight with felony sex perversion, or oral sex); Dal McIntire, *Tangents*, ONE, Feb. 1958, at 18 (describing an Oklahoma City stakeout of a Lincoln Park Zoo restroom that netted four men charged with committing a crime against nature, and six with unidentified charges); Dal McIntire, *Tangents*, ONE, May 1960, at 19-20 (discussing an Ann Arbor police six-month stakeout of University of Michigan restrooms resulting in 26 arrests, including 14 students and a professor).

72. See *People v. Earl*, 31 Cal. Rptr. 76, 77 (Dist. Ct. App. 1963).

the room and arrested Rhodes and Earl for violation of California's oral copulation law. The defendants were convicted in a nonjury trial and certified as sexual psychopaths; as such they were committed for indeterminate sentences at Atascadero State Hospital.

Less serious sex crimes (usually misdemeanors) such as attempted sodomy, solicitation, indecent liberties with a child, indecent exposure, lewd conduct, and disorderly sexual conduct were sometimes discovered through spying and observation, but typically required more direct police involvement through a decoy.⁷³ Generally, reasonably attractive policemen operated as decoys and loitered at a homosexual hangout to arrest men who proffered explicit passes such as verbal invitations or fondling of the decoy's genitals.⁷⁴ Decoys frequently operated as the sole method for enforcement of the most popular anti-homosexual misdemeanor laws, such as California's lewd vagrancy law, New York's disorderly conduct law, and the District's lewd solicitation law.⁷⁵

Defendants repeatedly complained that decoys behaved provocatively and misrepresented the precise language of the conversation.⁷⁶ Lawyer Frank Wood, who defended many accused homosexuals in California, described the "usual practices":

[S]omeone will strike up a casual conversation with you and then try to get you to say one of the magic words—maybe a nice old Anglo-Saxon word—or some word which we all know pertains in one manner or another to sex. All you have to do is say the magic word and that someone who struck up the conversation will be transformed into a vice officer and his brother officer will startlingly appear from nowhere and swear that with his excellent pair of ears he was able to overhear everything that went on.⁷⁷

Sometimes the vice officers were willing to forget the "magic words" in return for cash, but usually the words meant an overnight trip to jail, followed by a plea agreement. In California, for example, defendants usually agreed to plead to simple indecency to avoid conviction of lewd vagrancy, which triggered California's registration requirements.⁷⁸

Sometimes decoys acted aggressively. Dale Jennings of Los Angeles claimed that he was followed by "a big, rough looking charac-

73. See Abraham Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1163-65 (1960); Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1093 (1951); Harold Jacobs, Note, *Decoy Enforcement of Homosexual Laws*, 112 U. PA. L. REV. 259, 259-60 (1963).

74. See Jacobs, *supra* note 73, at 259-60.

75. See *id.*

76. See, e.g., JESS STEARN, *THE SIXTH MAN* 168 (1961).

77. Frank C. Wood, Jr., *The Homosexual and the Police*, ONE, May 1963, at 21.

78. See *id.* at 21-22.

ter" who tried to strike up a conversation with him.⁷⁹ Jennings stated that he feared robbery and thus tried to shake the man, but to no avail.⁸⁰ The man forced his way into Jennings' apartment and proceeded to undress.⁸¹ According to Jennings' account, the thug insisted that Jennings sit with him and urged Jennings to let his hair down and relax.⁸² The thug said he'd been in the Navy and "all us guys played around."⁸³ The account continued:

I told him repeatedly that he had the wrong guy; he got angrier each time I said it. At last he grabbed my hand and tried to force it down the front of his trousers. I jumped up and away. Then there was the badge and he was snapping the handcuffs on⁸⁴

It is difficult to determine how much of Jennings' account is representative of police behavior, or is even truthful. Nonetheless, a jury that had no reason to be sympathetic believed Jennings' story.⁸⁵ Similarly, fact-finders determined that Pittsburgh's vice squad entrapped and framed many victims in order to shake money out of them.⁸⁶

Police used the "jump raid" as a third tactic. Employed against houses of prostitution earlier in the century, in the postwar period police used the raid to disrupt homosexual socialization, usually in clubs and bars and sometimes in baths or parks. Raids in New York, San Francisco, and Los Angeles—the most popular homosexual cities—received the most publicity, but smaller urban centers used the jump raid because it proved less expensive than stakeouts and decoy operations. If decoy use was painstaking retail enforcement of anti-homosexual misdemeanor laws, the jump raid was by comparison cheaper wholesale enforcement. Unfortunately for the police, raids usually did not generate felony or even misdemeanor convictions, because the patrons could not be caught having sex or soliciting sex. Instead, police usually charged homosexuals with broadly phrased municipal offenses or state misdemeanors such as disorderly conduct or lewdness, offenses that could mean virtually anything.⁸⁷

By the 1950s, police were deploying the jump raid to arrest or harass larger numbers of homosexuals than had been the case before

79. Dale Jennings, *To Be Accused Is to Be Guilty*, ONE, Jan. 1953, at 11-12.

80. *See id.* at 12.

81. *See id.*

82. *See id.*

83. *Id.*

84. *Id.*

85. *See id.* at 13.

86. *See* Dal McIntire, *Tangents*, ONE, Sept. 1955, at 9.

87. *See* Dal McIntire, *Tangents*, ONE, Aug. 1955, at 11. Police arrested San Francisco's "Bunny" Breckenridge, a cross-dressing and probably transsexual man, in a sweep of the Sea Cow bar in 1955. A magistrate dismissed the vagrancy charge perhaps because Breckenridge was a multi-millionaire. *See id.*

World War II. A 1955 raid of the Pepper Hill Club in Baltimore resulted in 162 arrests for disorderly conduct based on observations of same-sex hugging and kissing.⁸⁸ A raid on Hazel's Bar near Redwood City, California, resulted in ninety arrests (seventy-seven men, ten women, and three teens) on vagrancy charges and one arrest—bar owner Helen Nickola—for permitting lewd dancing without a license.⁸⁹ A 1960 raid on the Tay-Bush Cafe in San Francisco resulted in 103 arrests (eighty-nine men and fourteen women) for same-sex dancing and for disorderly conduct.⁹⁰

The threat of police raids and surveillance kept most gay people away from homosexual hangouts and thus made such large arrests unusual. Miami's "E" Club raid on April 15, 1960, demonstrates the more typical scenario:

About 35 people were scattered around the U-shaped bar—the usual grand piano that doubles as a table—and the long booths that run from one end of the room to the other.

... One bartender had just finished saying to the other, as they both met at the cash register to ring up their sales, "Gee I hope business doesn't drop off now that the season is over," when a man in a black suit walked in and stood near the door. Quickly five others moved to strategic positions around the bar. It happened so fast that no one really took notice. Once the men were scattered around the bar, the "leader" said over the voice of Mr. [Johnny] Mathis, "OK, all drinks off the bar. Everyone here is under arrest." Several quiet curses were heard, and someone with bleached hair said to a friend, "Damn, not only is my life ruined, but the whole evening is spoiled." It was the last joke of the evening; the "E" club had just been raided.⁹¹

Police arrested the patrons for disorderly conduct "for being in a place frequented by homosexuals,"⁹² a fact established by the following intelligence: "Habitues of the place were reported to embrace each other, wear tight-fitting women's pants, and bleach their hair."⁹³ Police released the patrons for \$250 bond and the owner for \$750 bond, and the *Miami News* published a feature story on the raid that contained their names.⁹⁴ Reporter Walter Tucker, Jr., explained that "the public should know who these people are."⁹⁵

The Tampa, Florida, vice squad's June 1957 raid on Jimmie White's Tavern illustrates several additional features of the jump

88. See Dal McIntire, *Tangents*, ONE, Dec. 1955, at 12.

89. See Dal McIntire, *Tangents*, ONE, Apr.-May 1956, at 14.

90. See Dal McIntire et al., *Tangents*, ONE, Dec. 1961, at 16.

91. Charles K. Robinson, *The Raid*, ONE, July 1960, at 26.

92. *Id.*

93. *Id.*

94. See *id.*

95. *Id.* at 27.

raid.⁹⁶ Police arrested twelve women patrons for "mannish" dress.⁹⁷ While police used spies and decoys almost exclusively against homosexual men, they used the raid against lesbians as well. Lesbian bars and clubs existed before World War II in cities as different as Buffalo and New York City, and they became more common after the war. Because lesbians did not often engage in public sex in these establishments, and because the police had insufficient female officers to act as decoys, the police found it difficult to use felony and misdemeanor charges against lesbians. Instead, police relied upon the more general disorderly conduct and vagrancy prohibitions found in most state codes and municipal ordinances. Light penalties such as fines and short detentions often found enforcement only in municipal rather than state courts. Such minimal penalties, which triggered neither a right to a jury trial nor much judicial oversight, made such ordinances the perfect instruments for harassing lesbians.

Another legal justification for harassing lesbians was laws criminalizing the wearing of attire not of one's sex. Dozens of municipalities had ordinances making cross-dressing a criminal offense.⁹⁸ New York and California had statutes making it illegal to appear publicly in a "disguise" or "masquerade."⁹⁹ Although not targeted toward cross-dressing, police regularly used these statutes to harass or arrest cross dressers. New York reportedly followed a "three-piece" rule: a woman in trousers would not be charged under the disguise statute as long as she wore three pieces of women's clothing.¹⁰⁰ Cross-dressing laws applied to men as well. Detroit targeted only men,¹⁰¹ but the same ordinance made it unlawful for women as well as men to use public restrooms designated for the opposite sex.¹⁰² The city of Miami made cross-dressing a regulatory fetish. A 1952 ordinance forbade "female impersonators," and a 1956 ordinance made it a crime for anyone to appear in a "dress not customarily worn by his or her sex." (These and other Miami ordinances of the period are reproduced in Appendix 5 to this Article.)

96. See Dal McIntire, *Tangents: Trouble in Tampa*, ONE, Oct.-Nov. 1957, at 18-19.

97. *Id.* at 19.

98. I have copies of cross-dressing ordinances from places such as Cedar Rapids, Iowa; Charleston, West Virginia; Cheyenne, Wyoming; Chicago, Illinois; Columbia, Missouri; Dallas, Texas; Denver, Colorado; Detroit, Michigan; Houston, Texas, and many others. See Eskridge, *supra* note 19, app. 6 (listing references). Miami's ordinance, excerpted *infra* Appendix 5, is typical of municipal cross-dressing laws.

99. See, e.g., *People v. Gillespi*, 202 N.E.2d 565, 565 (N.Y. 1964) (finding the defendant guilty of the statute for wearing women's clothes and makeup).

100. See generally Nan D. Hunter, *Gender Disguise and the Law* (1990) (unpublished draft, on file with author).

101. See DETROIT, MICH., CODE § 39-1-35 (1944) (deeming it illegal "for any member of the male sex to appear in or upon any street . . . or other public way or place or in, upon or about any private premises frequented by or open to the public in the dress of the opposite sex").

102. See *id.* § 39-1-61.

In the 1950s, lesbians, gay men, and gender benders were at the mercy of the state if they sought to express their sexual or gender-role preferences. Virtually anything they did was against the law: consensual homosexual intercourse violated sodomy laws, which were serious felonies everywhere but New York and punishable by many years in prison or a mental institution; friendly invitations to engage in intercourse violated state laws making it a crime to attempt a felony as well as state and municipal solicitation laws; dancing, kissing, or even holding hands with someone of the same sex was considered by police to violate misdemeanor laws regulating private or public lewdness, indecency, or disorderly conduct; cross-dressing violated the law of two states and dozens of municipalities. For an example of the comprehensive regulatory regime barricading the homosexual in the 1950s, consult Appendix 2A of this Article, which lists the criminal laws and ordinances applicable to people in San Francisco in 1950. A similar exercise, generating a shorter list, could be accomplished for residents of all the major cities in the United States in the 1950s.

Not only was any kind of expressive conduct illegal, but there was also a tangible danger of being arrested for conduct that was consensual and even private. Solicitation for an intimate encounter led to arrest if the person solicited were a decoy cop. Intercourse led to arrest if police were watching through a peephole, from an adjoining stall, or through a vent. Kissing, handholding, and cross-dressing led to arrest if undercover police were watching or raided the establishment. Because anything one did could be discovered and made the basis for arrest, and because many people valued these means of expression a lot, the city was in the position of determining *ex ante*, rather than *ex post*, how much sex crime it would have. By investing a great deal of money in vice squads and turning them loose on ridiculously easy-to-catch homosexuals, the city could assure itself of tons of arrests for sex crimes. By investing less, the city could assure less sex crime. In short, the level of arrests for homosexual conduct was substantially endogenous to local political and cultural processes. It is worth exploring how those processes operated for the half-generation after World War II.

3. *Anti-Homosexual Panics and Manias*

Vice squad campaigns against homosexuals yielded an unprecedented number of arrests. The years 1946 through 1961 represented the high point for enforcement of both sodomy and disorderly conduct and degeneracy prohibitions in New York City. Annual sodomy arrests regularly exceeded 200, and degeneracy arraignments exceeded 3000 for several years before declining to between 1000 and

2000 for most of the 1950s.¹⁰³ A similar pattern was characteristic of San Francisco and Los Angeles, both of which had a big postwar increase; San Francisco showed another big spike in 1960-61.¹⁰⁴ The District of Columbia's 1970 arrest figures topped 1950s numbers, which were much higher than those from the 1930s, a pattern present in many southern cities.¹⁰⁵

In understanding the sodomy-arrest data, one should consider that most prosecutions stemmed from arrests for sex between an adult male and a male or female child. Approximately one-fifth involved male-female sex, usually coerced by the male. I estimate that approximately twenty to twenty-five percent of prosecutions arose from consensual same-sex adult intimacy.¹⁰⁶ Even discounted, the array of felony arrests for consensual same-sex intimacy is impressive. The figures greatly increase when arrests for lewd vagrancy (California), indecent exposure (Baltimore and other jurisdictions), and disorderly conduct (New York City and most other jurisdictions) are included. I estimate that the number of homosexuals arrested for sexual misdemeanors and offenses was on average about twenty times the number arrested for sexual felonies.¹⁰⁷ Given such a multiplier, it appears that each year law enforcement officials arrested tens of thousands of Americans and accosted many others for expressions of same-sex intimacy toward people believed to be inter-

103. See *infra* Appendices 1A, 1C.

104. See *infra* Appendix 1A.

105. See *infra* Appendix 1A.

106. The suggestion for these numbers originated from my analysis of District sodomy complaints, recounted in Appendix 1A. Sodomy arrests, for which I have no numbers, would yield lower figures for sex with minors or with women. To roughly determine whether this suggestion could be generalized, I read all the cases reported by the West National Reporter System under the category "Sodomy" for the years 1946 to 1969. The results were:

	<i>Man-Man (W-W)</i>	<i>Man-Woman</i>	<i>Man-Boy</i>	<i>Man-Girl</i>
Total	93 (2)	72	121	57
Calif.	23 (0)	30	22	9

Because this sample is skewed by appellate court selection bias and the vagaries of the West reporting system, I cannot determine absolute percentages. I do conclude, however, that during this period consenting same-sex couples did not account for most sodomy arrests.

107. For 1950s New York City, yearly arrests for sodomy ranged between 100 and 200 (Appendix 1A) while arrests for degeneracy were typically 10 to 20 times those figures (Appendix 1C). The San Francisco record of sex offense arrests between 1945 to 1950 suggests a multiplier of up to 20. See Appendix 2B.

The UCLA study also found that 439 cases in the Los Angeles County Superior Court for a three-year period (1962-64), or 146 cases per year, alleged violations of the state sodomy and oral perversion statutes. See Gallo et al., *supra* note 65, at 799. The study found that Los Angeles processed 2994 defendants in the Los Angeles Municipal Courts between May 1964 and April 1965, against whom the state alleged misdemeanors for lewd vagrancy, public indecency, and obscenity. Taking into account that the 439 cases involved more than 439 defendants and that the sodomy/oral perversion sample involved a larger county-wide jurisdiction, the conclusion is that 20 charges for homosexual solicitation or expression exist for every charge of homosexual anal or oral sex.

ested partners. Officers arrested much smaller numbers, proportionally, of heterosexual men for raping, abusing, molesting, or harassing women, and those arrested were much less likely to be prosecuted, convicted, or to serve jail time than those accused of consensual same-sex intimacy.¹⁰⁸

The large number of arrests during this period were a direct reflection of society's fear of the homosexual—the extent to which the polity saw the closet as straight-threatening and determined to open the door and cast out its dangerous inhabitants. The aggregate figures do not reflect another feature of this *grande peur*, namely, the way in which a single event would spontaneously spur an anti-homosexual *panic* or (if over a longer period of time) *mania* in a locality or state. Consider a few examples. During the summer of 1959, when police found the body of twelve-year-old Merrill Bodenheimer in an icebox, Houston, Texas, whipped itself into the greatest “sex-fiend hunt” in its history.¹⁰⁹ The police first focused on a man previously convicted of molesting girls (society believed all child molesters, including those assaulting girls, to be homosexuals). They then arrested seven African-American males, ages thirteen to seventeen, and extracted confessions that they had sexually abused and then killed the white boy. Some of the accused immediately recanted, stating that the confessions had been beaten out of them, and four of the defendants had witnesses placing them far from the assault at the time that it occurred. The decedent's mother slowed the Houston panic by writing an open letter denouncing the hate-filled rhetoric of the witch hunters: “People who are oppressed and deprived by society hit back. Finding my son's murderer will not keep alive some child who now lives—more murderers will be bred by the conditions which bred his murder.”¹¹⁰ The Houston panic reveals how anxiety about homosexuality, pedophilia, sexual violence, and interracial sexuality could interact combustibly.

The most famous, and least likely, location for an anti-homosexual panic that in turn triggered a longer-run mania was Boise, Idaho.¹¹¹ On October 31, 1955, a panic began with the arrest of

108. See Ralph Slovenko & Cyril Phillips, *Psychosexuality and the Criminal Law*, 15 VAND. L. REV. 797, 800 n.9 (1962) (noting that in 1960 New Orleans, 27% of the rape cases were prosecuted compared to 60% of the crime-against-nature cases; none of the rape cases resulted in convictions, while 20% of the crime against nature cases did bring convictions). The New York City degenerate incarceration rate towered 30 times above that for defendants convicted in the Magistrates' Courts for other offenses. See *infra* Appendix 1C. Although only episodic data exists, the incarceration rate appears to have been higher than any other sex offender charges with offenses rather than misdemeanors or felonies.

109. Dal McIntire, *Tangents*, ONE, Apr. 1960, at 15.

110. *Id.*

111. See JOHN GERASSI, *THE BOYS OF BOISE: FUROR, VICE, AND FOLLY IN AN AMERICAN CITY* 4 (1966); see also *Larsen v. State*, 337 P.2d 1 (Idaho 1959).

three blue-collar men for "unnatural" relations with several boys who, according to Ada County probation officer Emery Bess, comprised a "homosexual ring" of as many as 100 boys.¹¹² Although apparent from the beginning that the situation involved not simply boys but experienced male prostitutes, the community nonetheless whipped itself into a child-protection frenzy, resulting in an aggressively investigated and prosecuted scandal. The court sentenced one defendant to life in prison after he pled guilty to sodomy and lewd conduct with a minor. Another defendant, who cooperated with the prosecutor by identifying other homosexuals and boy prostitutes, got a suspended sentence. In November and December, the police arrested more homosexuals, some of them prominent citizens. Mayor Russ Edelfsen later said that 1472 people were interviewed in connection with the homosexual prosecutions.¹¹³

By the time the mania ended in early 1957, there had been tragic consequences for virtually all concerned. At least fourteen men pled guilty to charges of sodomy or lewd behavior, and juries convicted one and acquitted at least two.¹¹⁴ Eight received punitive sentences of between five years and life in prison, and at least one of the probationers ended up serving seven years in prison.¹¹⁵ A number of closeted homosexuals quietly decamped. Even the boys of Boise suffered from the panic. William H. Baker, one of the hustlers whose sworn statements triggered the scandal, killed his father six weeks later and a jury convicted him of manslaughter.¹¹⁶ His ten-year sentence for patricide equaled the sentence received by one of the original homosexual defendants, a clothing store clerk.

From 1952 through 1964, several manias swept Florida, which featured a unique intrastate combination of urban-cosmopolitan areas such as Miami and Dade County and a heavily rural culture in North Florida, along with intermediate locales such as Tampa, Tallahassee, and Gainesville. Because Miami and Miami Beach featured the largest and most diverse metropolitan areas, and thus harbored more radical subcultures, anti-homosexual hysteria originated in these cities.

In late 1953, Miami Beach Police Chief Romeo Shephard responded to complaints that the beach had become a hangout for men who behaved in a feminine manner, sported "girlish" hairstyles, and "pranced around" in droves wearing "Bikini-type" swimsuits.¹¹⁷

112. GERASSI, *supra* note 111, at 2.

113. *See id.* at 126.

114. *See id.*

115. *See* Dal McIntire, *Tangents*, ONE, Jan. 1956, at 12.

116. *See* GERASSI, *supra* note 111, at xvi-xvii.

117. Bureau of Public Information, *Miami Junks the Constitution*, ONE, Jan. 1954, at 16.

Shephard hauled such persons into the police station for questioning:

We had no charges we could book them on, but it's just a question of cleaning up a bad situation and letting undesirables know they're not wanted here. . . . We intend to continue to harass those men who affect female mannerisms in public places and let them know in no uncertain terms that they are unwelcome on Miami Beach.¹¹⁸

Simultaneously, Crime Commission of Greater Miami Operating Director Daniel Sullivan stated that those naturally prone to molesting and torturing children consisted of "sex perverts and degenerates."¹¹⁹ Because such people congregated in Miami area gay bars, Sullivan urged their closing. He added that such bars served as breeding grounds for crime: "In one bar two young service men met a man who, they said, made immoral advances to them. They beat him up and threw him into the bay where he drowned. And in one bar practically next door, a bartender was murdered in his apartment by a bar patron."¹²⁰ In other words, homosexuals were to be tracked down and expelled from the area because their existence impelled heterosexuals to kill them.

Unlike other cities, the anti-homosexual mania in Miami resulted in new laws as well as police crackdowns. Councilman Bernard Frank sponsored an ordinance in 1952 that made it illegal for "female impersonators" to perform in Miami.¹²¹ In 1953, he inveighed against "degenerate bars and hangouts" and wrote a letter urging Chief of Police Walter Headley to remove all "sex degenerates and female impersonators" from the city entirely.¹²² Headley apparently thought the idea imprudent and without legal basis.¹²³ *One*, a homosexual magazine, praised Headley and the city for taking a rule-of-law perspective regarding the witch hunt.¹²⁴ That praise was thrown back in their pragmatic faces by the Miami newspapers, which claimed that "Powder Puff Lane Has Become Equivalent of Old Red Light District" and "Is Greater Miami in Danger of Becoming a Favorite Gathering Spot for Homosexuals and Sexual Psychopaths?"¹²⁵ Mayor Abe Aronovitz, who had earlier advocated toleration for homosexuals and first gained public notoriety for treating people of

118. *Id.* at 19.

119. *Id.*

120. *Id.* at 18.

121. *Id.* at 18-19.

122. *Id.*

123. See Lyn Pedersen, *Miami Hurricane*, *ONE*, Nov. 1954, at 6 (quoting Headley: "If I ran all the homosexuals out of town, members of some of the best families would lead the parade.").

124. See Bureau of Public Information, *supra* note 117, at 20.

125. *Id.* at 5 (discussing *Miami Herald* articles).

color with respect, joined the attack on Headley in a dramatic radio address calling for the closing of all gay bars.¹²⁶ In the next two years, Mayor Aronovitz proposed and procured ordinances making it illegal for lesbians and homosexuals to congregate or to be served alcoholic beverages,¹²⁷ and to cross-dress or engage in any other kind of lewd behavior.¹²⁸

In August 1954, Police Chief Shephard led an assault on the effeminate men on Miami Beach, netting thirty-five bathers and booking six for disorderly conduct.¹²⁹ That same night, Dade County Sheriff Tom Kelly and forty-four deputies raided eleven Miami and Miami Beach bars, detaining fifty-three patrons and arresting nineteen, including one "fighting barmaid" who police charged with "striking a deputy and interfering with the raiders."¹³⁰ Acting Governor Charlie Johns, a law-and-order politician from rural upstate, criticized Kelly for being excessively tolerant of homosexuals and, in September, appointed Morey Rayman, a member of the state boxing commission, to "coordinate the Miami campaign against perverts."¹³¹ In that same month, chastened Miami City Manager E.A. Evans directed an all-out police harassment of bars catering to homosexuals.¹³² Their patrons scared away by repeated raids, most of the bars in Miami and Miami Beach went out of business by the end of the month.¹³³

The fury of 1954's "Miami Hurricane," as the homophile press dubbed it, abated, only to resurface, first in the 1956 campaign for Dade County Sheriff, then in a smaller witch hunt in Tampa during 1957-58, and finally in a statewide witch hunt from 1958 through 1964.¹³⁴ The 1956 dirty campaign for Dade County Sheriff featured charges by challenger Reubin Clein that incumbent Tom Kelly fostered racial integration, beat his wife, and had engaged in regular homosexual acts since age thirteen.¹³⁵ As reporter Lyn Pedersen described it:

It is of course ironic that "Clean-out-the-perverts" Kelly should be charged with repeated homosexual acts, considering how little reason homosexuals have to "claim" him. Several readers have written

126. See *id.* at 8.

127. See MIAMI, FLA., ORDINANCE § 51-35 (1954) (codified at MIAMI, FLA., CODE § 4-13 (1957)); see also *infra* Appendix 5.

128. See MIAMI, FLA., ORDINANCE § 55-21 (1956) (codified at MIAMI, FLA., CODE § 43-18 (1957)); see also *infra* Appendix 5.

129. See Pedersen, *supra* note 123, at 6.

130. *Id.*

131. *Id.*

132. See *id.*

133. See *id.*

134. See Dal McIntire, *Tangents*, ONE, Aug. 1961, at 24.

135. See Lyn Pedersen, *Miami's New Type of Witch Hunt*, ONE, Apr.-May 1956, at 6.

One . . . about Kelly's alleged well-known gay adventurings, and about alleged "protection payments" by gay bars, but we had let it pass. . . . It does go to show how hard it is to tell the witches from the witch hunters.¹³⁶

Notwithstanding the smear, Dade County reelected Kelly.

Tampa's vice squad became increasingly active in 1957. Tampa's mayor and city representatives considered enacting an ordinance against "perverts," but the city's vice squad behaved as though being lesbian was already illegal.¹³⁷ The raid on Jimmie White's Tavern, discussed above, functioned as the opening salvo in the anti-vice campaign and took eight officers to arrest twelve women for "man-nish" garb.¹³⁸ Although he conceded to the media that the police might not have had evidence of lawbreaking and that the arrested women would be released, police Captain Howell Ryals announced, "[W]e're going to keep after them until we run them out of town."¹³⁹ The next raid, on Funghie's Tavern, resulted in one arrest, again for cross-dressing (even though this was not a crime in Tampa as it was in Miami and Miami Beach).¹⁴⁰ "If you're a woman, you ought to dress like one," the police lectured one lesbian.¹⁴¹ Officer Guy Wool-weaver complained that "perverts" had relocated to Tampa after fleeing the Miami crackdown and vowed to force them to another locale.¹⁴² The Knotty Pine Bar experienced the next raid with fifteen men and women arrested, but police released them at the station-house when it appeared they had committed no crime.¹⁴³ So it continued in Tampa throughout the summer of 1957.

Notwithstanding these local vice efforts, more serious action in Tampa grew out of the investigation of sexual perversion at the Southwestern Florida Tuberculosis Hospital by the Hillsborough County Sheriff's Office and, then, by a special state legislative investigation committee.¹⁴⁴ In 1960-61, alerted to the possibility of rings of homosexuals in Tampa and surrounding Hillsborough County, Sheriff Blackburn and forty-five deputies used two-way mirrors, movie cameras, and a taping system to film and tape sex perversions occurring in the restrooms of a North Tampa shopping center.¹⁴⁵ In

136. *Id.* at 7.

137. Dal McIntire, *Tangents*, ONE, Oct.-Nov. 1957, at 19.

138. *Id.* at 19.

139. *Id.*

140. *See id.*

141. *Id.*

142. *Id.*

143. *See id.*

144. *See* Deposition of [name blackened out], Special Investigator, Twelfth Judicial Circuit, by Mark R. Hawes, Chief Counsel, Fla. Legis. Investigation Comm. 4 (Feb. 6, 1959) (available at Fla. Dep't of State, Div. of Archives, ser. 1486, carton 7, Tallahassee, Fla.).

145. *See* Dal McIntire, *Tangents*, ONE, Aug. 1961, at 24-25.

June 1961, in the early morning, Blackburn's deputies swept the city to arrest the thirty persons whose perversions had been taped.¹⁴⁶ Police arrested a public school principal, a medical doctor, and a former air force officer, among others, and the press duly printed their names and addresses.¹⁴⁷ Sheriff Blackburn proclaimed this the largest "morals crackdown" in the history of Florida and boasted that there would be 100 more arrests as a result of continuing investigations.¹⁴⁸ In copycat style, Tampa Chief of Police Neil Brown ordered city vice police to haul forty-eight persons in for questioning, based upon their being spotted in "known homosexual hangouts."¹⁴⁹ He and his staff compiled a master list of homosexuals from mug books and surveillance reports since 1955.¹⁵⁰ At the end of June 1961, State Attorney Paul Johnson warned Tampa parents of the growing danger from "perverts."¹⁵¹ Breathlessly reported by the media, Johnson reported that "investigations have shown this problem to be even more widespread than we first anticipated. We have arrested at least 130 persons for crimes against nature and lewd and lascivious acts in the last 90 days," and most admitted their guilt.¹⁵²

Coming full circle, Miami returned to full-scale witch-hunting. In November 1960, the U.S. Post Office and the Broward County Sheriff's Office raided the home of a twenty-two-year-old Fort Lauderdale male prostitute.¹⁵³ The deputy sheriffs found hundreds of lewd photographs, mostly of minors, as well as the young man's diary.¹⁵⁴ The diary indicated that the man acted as the center of a network of rich Dade County "queens," hustlers, and models for lewd photographs that the man took on his Polaroid. Models, usually aged fourteen to nineteen, included construction workers, sailors, high school and college students, bag boys, stock boys, bellhops, hitchhikers, and other hustlers. The man cooperated with the authorities, as did several youths involved in his ring of models and call boys. A sheriff's report described the main targets of the rapidly expanding investigation as "producers who are aggressive homosexuals, and who are

146. See *id.* at 24.

147. See *id.* at 24-25.

148. See *id.*

149. *Id.* at 25.

150. See *id.*

151. *Id.*

152. *Id.*

153. Memorandum from Dade County Sheriff's Office, Opening Case No. 71821 C (Nov. 1960) (available at Fla. Dep't of State, Div. of Archives, ser. 1486, carton 13, Tallahassee, Fla.) [hereinafter Dade County Sheriff's Memorandum]; officials created a redacted form of the diary consisting of 24 pages of single-spaced typescript. See Redacted Diary, Jan.-Nov. 1960 (available at Fla. Dep't of State, Div. of Archives, ser. 1436, carton 13, Tallahassee, Fla.).

154. See Dade County Sheriff's Memorandum, *supra* note 153, at 3.

inducing young juveniles to pose and then to commit, or allow the subjects to commit unnatural sex acts upon them."¹⁵⁵

Dade County law enforcement officers compiled dozens of names of men suspected of patronizing either the call-boy or the pornography services, including restaurant and bar owners, school teachers, doctors and attorneys, municipal officials, a former disc jockey, and male pimps.¹⁵⁶ They became frustrated, however, because

most of the influential gays are usually wealthy, and for that reason it is very difficult to make a case against them because the people with whom they associate are usually equally wealthy or are hustlers, young boys who are queer, and some who are not, who live on nothing else but what they can obtain from these gay people who are wealthy . . . [and therefore were not inclined to] cut off the hand that feeds them.¹⁵⁷

Working with the state police, the state Beverage Department, and Florida's Legislative Investigation Committee, Sheriff Kelly and his men gathered the names of 150 boys involved in "homosexual rings" and several of the adult ring leaders,¹⁵⁸ several hundred names of local consumers of child pornography, and 13,000 names of pornography consumers elsewhere in the United States and the world. Police made several arrests, but the state did not bring most of the major operators to justice.

Rather than hauling in the big fish, the police contented themselves with the small fry. In January 1961, the Miami Beach Police Department raided the usual homosexual hangouts but brought in a pitifully puny haul: two people, one for wearing female attire and one for lewd and lascivious behavior (oral sex).¹⁵⁹ Miami Police Chief Headley assigned eleven decoy cops to make themselves "approachable" to homosexuals and arrested a few propositioners, but no one who could be considered a homosexual "ring leader."¹⁶⁰ Ironically, Miami and Dade County law enforcement officers finally found homosexual activity that might be considered a public menace—public prostitution and pornography involving minors—yet ended up hunting the same female impersonators they had been targeting

155. *Id.*

156. *See id.*

157. *Id.* at 7.

158. *See* Memorandum from R.J. Strickland, Chief Investigator, Fla. Legis. Investigation Comm., to William G. O'Neill, Chairman, Fla. Legis. Investigation Comm. (May 30, 1961) (available at Fla. Dep't of State, Div. of Archives, ser. 1486, carton 1, Tallahassee, Fla.); Memorandum from T.A. Buchanan, Chief, Detective Division, Dade County Metro Dep't of Pub. Safety, to Thomas J. Kelly, Sheriff, Dade County Metro Dep't of Pub. Safety (June 3, 1961) (available at Fla. Dep't of State, Div. of Archives, ser. 1486, carton 1, Tallahassee, Fla.).

159. *See* Dade County Sheriff's Memorandum, *supra* note 153, at 3.

160. Dal McIntire et al., *supra* note 90, at 7.

since 1952. The Florida Legislative Investigation Committee, dubbed the "Johns Committee" after its Chair, Senator Charlie Johns,¹⁶¹ who had returned to the state senate after his stint as governor, coordinated their activities along with those of the Hillsborough County Sheriff's Department and the Tampa police. Under the auspices of the Johns Committee, the local anti-homosexual manias in Miami and Tampa became part of a comprehensive statewide mania described in the next sections.

B. Employment Law: Subversion, Blackmail, and Immorality in Government Service

The local panics and manias described above must be understood in the context of the national "supermania" that was directed against homosexuals, commencing in 1947 and operating through the 1950s. Unlike state and local governments, the federal government is not charged with the enforcement of criminal laws regulating sexual deviance, with the important exception of criminal laws applicable to the U.S. armed forces. Thus, the national anti-homosexual backlash received expression mainly through civil remedies such as exclusion from civil service employment, military service, and immigration or citizenship. State and local governments followed and sometimes anticipated the national lead in such exclusions, but the federal government remained the undisputed champion of the anti-homosexual witch hunt. The same cultural anxiety about gender and sexual deviance that fueled local bar raids, sodomy and lewd vagrancy arrests, and vice squad operations, fueled the national witch hunts designed to purge the civil services and military of "homosexuals and perverts." The same return-to-normalcy attitude prevailed with a vengeance at the national level because the federal government had much vaster resources it was willing to invest. Not only did the federal government exclude homosexuals from the employment forum, but it also searched for and destroyed homosexual lives through an often relentless federal *persecutorocracy* consisting of the FBI, the Civil Service Commission, and the Defense Department.¹⁶²

1. Supermania: The Creation of Federal Anti-Homosexual Exclusions, 1947-1952

Not until mobilization for World War II did the United States begin to think systematically about homosexuality in government service. Since 1920, sodomy had been a military crime, and men were episodically separated from the service for sodomy or attempted

161. Dem., Starke, 1936-53; 1955-68.

162. See discussion *infra* Part I.B.1-2.

sodomy under section eight, or less than honorable "blue" discharges.¹⁶³ As mobilization for war approached, the military's psychiatric advisers believed that the homosexual should be more systematically prevented from entering the armed forces.¹⁶⁴ In 1942, the War Department developed rough guidelines and procedures for excluding homosexuals from military service and, during the war, negotiated the separation of several thousand homosexuals through blue discharges.¹⁶⁵

At the height of the war, War Department policy softened, based upon expert opinions and the need for personnel. In a 1943 memorandum, the Surgeon General posited that homosexuality should be dealt with as a medical rather than purely criminal matter and made the following recommendations:

Overt cases of homosexuality in the Army have presented a serious problem in disposition when discovered. It has been agreed by many enlightened authorities that consideration should be given to the adoption of a procedure dealing with homosexuals which is more nearly in accord with accepted neuropsychiatric knowledge rather than with the generally prevailing practice of looking upon homosexuality as falling entirely within the purview of criminal law. . . . It is well known . . . that some individuals do not develop beyond a homosexual level. Further, it is known that under suitable conditions many persons considered normal may revert to a homosexual level and may engage in homosexual practices. Of these groups, some will seek out others of a like make-up while a few, like the rapist, will, if necessary, resort to violence to compel submissions to their demands. In the case of this latter small group, penal treatment is clearly indicated; the rights of others are so clearly violated that no other course can be tolerated. Homosexual activities, accompanied by coercion of a mental or physical nature, and those . . . directed towards minors, are proper subjects for penal treatment, provided that the defendant is found to be legally responsible. In the case of homosexuals who engage in their chosen sexual activities with those of like taste who, far from resisting, may seek such gratification, the violation of individual rights is rather remote. It is, however, recognized that a known homosexual in an organization may seriously impair the morale of the organization.¹⁶⁶

Responding to the Surgeon General's memo and (more important) to the need for military personnel, War Department Circular No. 3,

163. BÉRUBÉ, *supra* note 20, at 139.

164. *See id.*

165. *See id.* at 147.

166. U.S. Army Surgeon General, *Disposition of Overt Cases of Homosexuality*, in ARMY MEDICAL BULLETIN NUMBER 66, at 83 (1943). Army Regulation 615-368 codified this philosophy in 1945. *See* U.S. WAR DEPT., ARMY REG. NO. 615-368, *Enlisted Men: Discharge—Undesirable Traits of Character* 1-4 (Mar. 7, 1945) (amended Apr. 10, 1945).

issued in 1944, recommended separation rather than court martial even for the "true or confirmed homosexual" not deemed "reclaim[able]."¹⁶⁷ For the "reclaimable" homosexual with misconduct not aggravated by independent offenses such as rape, the policy required hospitalization and treatment.¹⁶⁸ Procedures required that the homosexual deemed unreclaimable be discharged dishonorably or by courtmartial.¹⁶⁹ If requested "[t]he offender who is deemed reclaimable and whose misconduct does not involve additional acts punishable by court martial will be hospitalized, and, depending upon the results of treatment, will be either restored to duty, separated from the service, or tried by court martial."¹⁷⁰ An April 1945 amendment added:

The mere confession by an individual to a psychiatrist that he possesses homosexual tendencies will not in itself constitute sufficient cause for discharge under these regulations. In such cases the individual concerned . . . will be hospitalized and, depending upon the results of the observation and treatment, will be either restored to duty or separated from the service.¹⁷¹

Under the foregoing regulatory regime, few service personnel were separated from the armed forces in the last year of the war.

In the spring of 1944, the War Department Inspector General conducted an investigation of the Women's Army Corps (WAC) training camp.¹⁷² This investigation became the most prominent armed forces investigation into homosexuality during the war. Mrs. Josephine Churchill triggered the investigation by writing a letter to complain that Fort Oglethorpe is "full of homosexuals and sex maniacs," one of whom had molested her twenty-year-old daughter.¹⁷³ Mrs. Churchill threatened to "reveal the scandal to the world" if remedial steps were not immediately taken.¹⁷⁴ The investigation by Lieutenant Colonel Birge Holt and Captain Ruby Herman followed the nonpunitive, rehabilitative policy of the Surgeon General's memorandum and Circular No. 3, both of which their report quoted. The report concluded that despite Mrs. Churchill's charges, Fort

167. U.S. WAR DEP'T, CIRCULAR NUMBER 3: HOMOSEXUALS (1943), *quoted in* BÉRUBÉ, *supra* note 20, at 142.

168. *See id.*

169. *See* U.S. Army Surgeon General, *supra* note 166.

170. U.S. WAR DEP'T, *supra* note 166, at ¶ 2.b.1-2.

171. *Id.* ¶ 2.b.2½.

172. *See* Memorandum from Birge Holt, Lieutenant Colonel, U.S. War Dep't, and Ruby E. Herman, Captain, U.S. War Dep't, to the Acting Inspector General (July 29, 1944) (available at Nat'l Archives, Record Group 159 [Office of Army Inspector General], file 333.9 [3rd WAC Training Center]) [hereinafter Holt & Herman Memorandum].

173. Letter from Mrs. Josephine Churchill to Commanding General, Judge Advocate, War Dep't (May 12, 1944), *reprinted in* Holt & Herman Memorandum, *supra* note 172, app.

174. *Id.*

Oglethorpe did not overflow with "homosexuals and sex maniacs," but that several female couples did engage in homosexual affairs.¹⁷⁵ They recommended treatment for five of the women and separation for one.¹⁷⁶

During the transition from the wartime to the peacetime military, the Adjutant General's Office of the War Department directed that Circular No. 3 and its codification in Army Regulation 615-368 continue in force, with a couple of lenient variations. Enlisted personnel and officers discharged because of homosexual tendencies rendering them completely "inadaptable" were to be given honorable, rather than blue, discharges unless they had committed a sexual offense.¹⁷⁷

Once the war ended, however, the pressure for military personnel eased, and the temptation existed to enforce the homosexual exclusion more rigorously. During the postwar occupation of Europe, General Dwight D. Eisenhower heard rumors of lesbian activity among the WACs.¹⁷⁸ He reportedly asked his staff associate, WAC Sergeant Johnnie Phelps, to conduct an investigation and to obtain a list of suspected lesbians, who would then be separated.¹⁷⁹ Phelps, who greatly respected Eisenhower, recalls that she agreed to conduct the investigation but told him that discharging all the lesbians would clean out the battalion of its most industrious and decorated personnel and officers.¹⁸⁰ She added, "and the first name on the list will be mine."¹⁸¹ Eisenhower's secretary corrected her: "If the General pleases, Sergeant Phelps will have to be second on the list. I'm going to type it. My name will be first."¹⁸² By Phelps' later account, a stunned Eisenhower shook his head and said, "Forget the order."¹⁸³

The Phelps incident illustrates the transition from the mild and therapeutic homosexual exclusionary policy during the war to a progressively more aggressive one after the war as America was renormalizing. The election of 1946 marked a sharp shift to the right in American politics, a triumph of localism over internationalism, rural values over urban ones. Its impact on the federal government's policy toward homosexuals was immediate. While testifying before a Senate

175. See Holt & Herman Memorandum, *supra* note 172, at 33-34.

176. See *id.*

177. Memorandum from Major General Edward F. Witsell, Acting Adjutant General, U.S. War Dep't, to Commanding Officers Having General Court-Martial Jurisdiction (Oct. 31, 1945); see also U.S. WAR DEP'T, CIRCULAR NUMBER 85 (Mar. 23, 1946) (confirming same policy); U.S. ARMY, ARMY REG. 615-368 ¶ 3 (May 14, 1947) (representing one codified form of the policy).

178. See *Before Stonewall: The Making of a Lesbian and Gay Community* (PBS television production, 1984) (containing a video interview with Sergeant Phelps).

179. See *id.*

180. See *id.*

181. *Id.*

182. *Id.*

183. *Id.*

Appropriations subcommittee in 1947, just as the sex-crime panic swept the country, the subcommittee gave Secretary of State and former Army Chief of Staff George Marshall a memorandum admonishing him about "the extensive employment in highly classified positions, of admitted homosexuals, who are historically known to be security risks."¹⁸⁴ Washington insiders understood this to be a cloaked reference to Sumner Welles. Led by Senator Kenneth Wherry, Nebraska's "merry mortician," the Republicans on the subcommittee hectored the Truman Administration to cleanse the government. Thus, at precisely the same time and for the same reason that officials began the anti-Communist witch hunt, a federal anti-homosexual hunt began as well. As a result of this pressure, the Truman Administration adopted the loyalty-security program to weed out Communists and then started looking for homosexuals in earnest. Between 1947 and 1950, the administration investigated 574 cases of "sex perversion" in civil government; most of the investigation subjects were discharged or resigned.¹⁸⁵ During the same period, 3245 personnel were separated from the military at triple the percentage-of-personnel discharge rate during World War II.¹⁸⁶ Contrary to the 1945-46 policy, the discharges were generally less than honorable, thereby depriving these personnel veteran's benefits and exposing them to discrimination in the private sector.

A Defense Department memorandum of October 11, 1949, drafted a stricter policy for homosexual separation.¹⁸⁷ The new policy made mandatory the prompt separation of all "known homosexuals."¹⁸⁸ Confirmed homosexuals fell into three groups: Class I, those who engaged in coercive sex or sex with minors, were to be court-martialed;¹⁸⁹ Class II, those who engaged in "one or more homosexual acts" or proposals or attempts "to perform an act of homosexuality," were to be court-martialed or allowed to resign under less than honorable conditions;¹⁹⁰ and Class III, those who "only exhibit, pro-

184. Johnson, *supra* note 2, at 49.

185. See *infra* Appendix 3.

186. See BÉRUBÉ, *supra* note 20, at 262, 354 n.14. The absolute per annum numbers were higher during the war, but the numbers as a percentage of total troop strength were higher after the war because the armed forces downsized dramatically. The rate of discharge fell during the Korean War, when once more the armed forces sacrificed the anti-homosexual policy to needs for troop strength.

187. See Memorandum from Dep't of Defense to Sec'y of Army, Navy, & Air Force 1 (Oct. 11, 1949) [hereinafter DOD Memorandum], reprinted in REPORT OF THE BOARD APPOINTED TO PREPARE AND SUBMIT RECOMMENDATIONS TO THE SECRETARY OF THE NAVY FOR THE REVISION OF POLICIES, PROCEDURES AND DIRECTIVES DEALING WITH HOMOSEXUALS app. 5 (1957) [hereinafter CRITTENDEN REPORT]; Louis J. West & Albert J. Glass, *Sexual Behavior and the Military Law*, in SEXUAL BEHAVIOR AND THE LAW 250, 256 (Ralph Slovenko ed., 1965).

188. DOD Memorandum, *supra* note 187, at 1.

189. See *id.*

190. *Id.* at 2.

fess, or admit homosexual tendencies"¹⁹¹ but had not engaged in forbidden conduct, were to be retained or discharged (honorably or generally) depending upon the recommendation of a personnel board.¹⁹²

On February 28, 1950, Under Secretary of State John Peurifoy testified that since 1947, ninety-one State Department employees, almost all of them homosexuals, had been dismissed for "moral turpitude."¹⁹³ Republican Senators Joseph McCarthy of Wisconsin and Styles Bridges of New Hampshire criticized the Truman Administration for tolerating subversion too long. Senator W.R. Jenner cracked that Truman's Fair Deal was more of a "fairy deal" for the American people.¹⁹⁴ Journalists openly discussed the Sumner Welles legacy. When Lieutenant Roy E. Blick of the District vice squad testified before another Senate appropriations panel on April 1, 1950, that there were 5000 homosexuals working for the government in the District—a figure Lieutenant Blick essentially pulled out of the air—Senator Wherry, now floor leader of the Senate GOP, called for a full-fledged Senate investigation.¹⁹⁵ National Republican Party Chairman Guy Gabrielson sent several thousand Republican party workers a newsletter, alerting them to the new "homosexual angle" in Washington: "[S]exual perverts . . . have infiltrated our Government in recent years," he warned, and then stated they were perhaps "as dangerous as the actual Communists."¹⁹⁶ Eager to fend off Republican charges, the Truman Administration stepped up its investigations. Between January 1, 1947, and April 1, 1950, the government investigated 192 employees for sexual perversion.¹⁹⁷ Over the next seven months, 382 more employees underwent government scrutiny.¹⁹⁸ Most were fired or resigned from their jobs.¹⁹⁹

The Senate authorized the investigation demanded by Wherry, which produced a full-dress report of a subcommittee chaired by North Carolina Senator Clyde Hoey.²⁰⁰ The report described the case against permitting "homosexuals and other sex perverts"²⁰¹ in the federal government.²⁰² The report argued that "[t]he social stigma

191. *Id.*

192. *See id.* at 2-3.

193. Johnson, *supra* note 2, at 47.

194. *Id.* at 50.

195. *See id.* at 49; NEIL MILLER, *OUT OF THE PAST: GAY AND LESBIAN HISTORY FROM 1869 TO THE PRESENT* 274-75 (1995).

196. Miller, *supra* note 195, at 259 (quoting Gabrielson newsletter).

197. *See* SUBCOMM. ON INVESTIGATIONS OF THE SEN. COMM. ON EXPENDITURES IN THE EXEC. DEPT'S, *INTERIM REPORT: EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT* 8 (1950) [hereinafter *EMPLOYMENT OF HOMOSEXUALS IN GOVERNMENT*].

198. *See id.*

199. *See infra* Appendix 3.

200. *See* *EMPLOYMENT OF HOMOSEXUALS IN GOVERNMENT*, *supra* note 197, at 1.

201. *Id.*

202. *See id.* at 3-8.

attached to sex perversion is so great that many perverts go to great lengths to conceal their perverted tendencies . . . [making them easy prey for] gangs of blackmailers."²⁰³ Also, "those who engage in overt acts of perversion lack the emotional stability of normal persons," and "indulgence in acts of sex perversion weakens the moral fiber of an individual to a degree that he is not suitable for a position of responsibility."²⁰⁴ Finally:

[P]erverts will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true in the case of young and impressionable people who might come under the influence of a pervert. . . . One homosexual can pollute an entire office. Another point to be considered . . . is his tendency to gather other perverts about him.²⁰⁵

The subcommittee approvingly reported the progress that had been made against this menace.²⁰⁶ It held up the armed forces' large-scale purge of homosexuals as the model and urged civilian agencies to follow suit,²⁰⁷ which they did. The United States Civil Service Commission's regulation barring from federal employment people who engage in "immoral conduct" secretly interpreted this to include "homosexuality or other types of sex perversion" as "sufficient grounds for denying appointment to a Government position or for the removal of a person from the Federal service."²⁰⁸ To enforce this policy, the Civil Service Commission began checking fingerprints of job applicants against FBI files of arrests across the country. Between 1947 and 1950, the federal government denied employment to 1700 applicants because they had "a record of homosexuality or other sex perversion."²⁰⁹ Because many homosexuals began government service employment before 1947, federal departments and agencies conducted their own search-and-expel missions. Between 1947 and 1950, agencies investigated 574 suspected homosexuals, the large

203. *Id.* at 3.

204. *Id.* at 4.

205. *Id.*

206. *See id.* at 1.

207. *See id.* at 8.

208. Letter from James E. Hatcher, Chief, Investigations Division, U.S. Civil Service Commission, to Donald W. Cory (May 3, 1951), reprinted in DONALD W. CORY, *THE HOMOSEXUAL IN AMERICA* 269 (Arno Press 1975) (1958); *see also* Memorandum from D.J. Brennan, Jr., to W.C. Sullivan, Re: Mattachine Society of Washington (Dec. 24, 1963) (on file with author) (quoting the Director of the Bureau of Personnel Investigation: "Persons about whom there is evidence that they have engaged in or solicited others to engage in homosexual or sexually perverted acts with them without evidence of rehabilitation are not suitable for Federal employment.").

209. EMPLOYMENT OF HOMOSEXUALS IN GOVERNMENT, *supra* note 197, at 9. The most sensitive agencies—the FBI, the Atomic Energy Commission, and the State Department—subjected applicants to complete personal history investigations. *See id.*

majority of them resigning or being dismissed from government service.²¹⁰

The subcommittee expressed satisfaction with these procedures but objected to the failure of some agencies to hunt down and expose every homosexual. The subcommittee rejected the

false premise that what a Government employee did outside of the office on his own time, particularly if his actions did not involve his fellow employees or his work, was his own business. That conclusion may be true with regard to the normal behavior of employees in most types of Government work, but it does not apply to sex perversion or any other types of criminal activity or similar misconduct.²¹¹

The federal government did not allow heterosexuals "to adopt a head-in-the-sand attitude toward the problem of sex perversion."²¹² Instead, it expected agencies to investigate any and every complaint as aggressively as possible. Beginning in 1950, the FBI began comparing morals arrests from everywhere in the country against lists of government employees.²¹³ In short, the subcommittee rejected the closet as either a refuge for the homosexual or an accommodation to heterosexuals. Instead, the closet came to be seen as threatening, rather than protective, to heterosexual society.

At the same time the Hoey Subcommittee studied ways to purge homosexuals from inside the government, a subcommittee of the Senate Judiciary Committee drafted a law to keep homosexuals outside of the country. The Immigration Act of 1917²¹⁴ excluded immigrants who had been convicted, or admitted conduct amounting to, crimes of "moral turpitude," and the Immigration and Naturalization Service (INS) interpreted this provision to exclude noncitizens who were convicted of sodomy, gross indecency, or open and gross lewdness.²¹⁵ The 1917 statute also excluded noncitizens who were diagnosed with "constitutional psychopathic inferiority,"²¹⁶ a medical phrase often used by the Public Health Service (PHS) and INS to exclude sexual deviates. In the 1940s, the INS regularly and increasingly used this as a basis for excluding people from entry into this country.²¹⁷

210. See *infra* Appendix 3.

211. EMPLOYMENT OF HOMOSEXUALS IN GOVERNMENT, *supra* note 197, at 10.

212. *Id.*

213. See *id.* at 13.

214. Ch. 29, 39 Stat. 874 (1917).

215. See, e.g., *In re J—*, 2 I. & N. Dec. 533 (Board of Immigration Appeals, April 2, 1946) (deportation for conviction under Massachusetts' "unnatural and lascivious act" law); *In re Z—*, 2 I. & N. Dec. 316 (Board of Immigration Appeals, June 9, 1945) (exclusion for conviction under Canada's gross indecency law).

216. Immigration Act of 1917 § 3, 39 Stat. at 875.

217. See, e.g., *In the Matter of V—*, 2 I. & N. Dec. 127 (Board of Immigration Appeals, July 22, 1944) (excluding a 35-year-old Canadian citizen who wished to join the U.S.).

In 1950, the immigration subcommittee headed by Nevada Senator Patrick McCarran developed a comprehensive redraft of the immigration law.²¹⁸ The McCarran bill focused on excluding Communists, anarchists, and other "subversives."²¹⁹ Reflecting the heightened fears that homosexuals, perhaps seen as sexual anarchists, were subversive in similar ways as political anarchists, the McCarran bill would have excluded all "persons afflicted with psychopathic personality, or who are homosexuals or sex perverts."²²⁰ Upon the assurance of the PHS that the term "psychopathic personality" was broad enough to "specify such types of pathologic behavior as homosexuality or sexual perversion," the Senate and House Judiciary Committees settled for an exclusion of "persons afflicted with psychopathic personality."²²¹ The McCarran-Walter Act of 1952 included this exclusion as section 212(a)(4).²²² The PHS and INS not only interpreted section 212(a)(4) to exclude homosexuals entering after 1952, but also read prior law as reflecting an intent to exclude homosexuals.²²³

The McCarran-Walter Act's exclusion of persons afflicted with psychopathic personality depended upon the PHS's ability to diagnose such a condition. Like army doctors during World War II, PHS doctors during the 1950s and 1960s showed little aptitude for such diagnoses, and so the only aliens so excluded under this category, as under the "crime of moral turpitude" category which the McCarran Act retained, were people with an arrest record for homosexual offenses. These included not just felonious sodomy, but also misdemeanors such as lewd vagrancy (California), disorderly conduct-degeneracy (New York), solicitation, and indecent exposure. As indicated above, this period witnessed sharp increases in arrests for all these crimes, and therefore increased opportunities for deporting homosexual aliens. Typical was the case of Roberto Flores-Rodriguez, an immigrant from Cuba who was deported after he was convicted in

Army); *In the Matter of M—*, 2 I. & N. Dec. 694 (Board of Immigration Appeals, July 24, 1946) (deporting a 45-year-old female native of the United Kingdom).

218. See S. 2550, 82d Cong. (1952).

219. See *id.* § 241(a)(6).

220. *Id.*

221. H.R. 1365, 82d Cong., reprinted in 1952 U.S.C.A.N. 1653, 1701; see also S. REP. NO. 1137, at 9 (1950):

The provision of S. 716 . . . which specifically excluded homosexuals and sex perverts as a separate excludable class does not appear in the instant bill. The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts. This change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates.

222. See McCarran-Walter Act, Pub. L. No. 414, § 212(a)(4), 66 Stat. 163, 182 (1952) (amended 1990).

223. See *In re La Rochelle*, 11 I. & N. Dec. 436 (Board of Immigration Appeals, Dec. 1, 1965).

New York City of disorderly conduct-degeneracy for soliciting sex in a public restroom. Even though he was only convicted of an "offense" (less serious than a misdemeanor), the government in 1956 deported him under both the "crimes of moral turpitude" and "constitutional psychopathic inferiority" prongs of the 1917 statute.²²⁴

2. *The Federal Witch Hunts, 1953-1961*

After the Hoey Subcommittee issued its report, the investigations, resignations, and dismissals accelerated, such that the anti-homosexual witch hunt overwhelmed the anti-Communist witch hunt in importance. Between 1947 and April 1, 1950, an average of five homosexuals were dismissed from the civil service each month; the average went up to sixty per month between April and November and remained at double-digit monthly levels through 1955.²²⁵ The Eisenhower Administration prepared to act at least as aggressively as the Truman Administration. In April 1953, Eisenhower issued an executive order adding "sexual perversion" as a ground for investigation under the federal loyalty-security program,²²⁶ which was designed in the Truman Administration to weed out subversives from government.²²⁷ During the next two years, more than 800 federal employees resigned or were terminated because they had "files contain[ing] information indicating sex perversion."²²⁸ That information was often very tenuous. For example, in 1956, the Department of Labor fired Bruce Scott from a job that he had held for seventeen years after charging him with perversion.²²⁹ The charge was based on a 1947 arrest—not conviction—for loitering in Lafayette Park, a well-known cruising area for men.²³⁰

The rate of expulsion abated in the later years of the Eisenhower Administration. However, Eisenhower's Executive Order 10,865²³¹ presented the occasion for fresh homosexual exclusions. Replacing earlier policies that had been invalidated by the Supreme Court for procedural reasons,²³² the 1960 directive established the Industrial

224. See generally *United States v. Flores-Rodriguez*, 237 F.2d 405 (2d Cir. 1956).

225. See D'EMILIO, *supra* note 20, at 44.

226. Exec. Order No. 10,450, 3 C.F.R. 936, 938 (1953).

227. See 3 C.F.R. § 8(a)(1)(iii) (1953) (authorizing investigations to dig up "[a]ny criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion" . . . on the part of federal government employees).

228. Johnson, *supra* note 2, at 53.

229. See *id.* at 60.

230. See *Scott v. Macy*, 349 F.2d 182 (D.C. Cir. 1965). Scott's arrest was part of the U.S. Park Police's 1947-48 "Pervert Elimination Campaign," during which 543 men were questioned and fingerprinted, and 76 arrested. See Johnson, *supra* note 2, at 52.

231. 25 Fed. Reg. 1583 (1960).

232. See *Greene v. McElroy*, 360 U.S. 474, 508 (1959) (invalidating executive security clearance procedures as an unconstitutional usurpation of legislative power).

Security Program to protect against security breaches by private sector employees working on sensitive government defense contracts. This was one manner in which federal government anti-homosexual policy spilled over into the private sector.²³³ Other spillover effects resulted from the federal government's willingness to share police records and grounds for discharge with private employers. Thus, a person discharged from a federal agency as a homosexual or sex pervert often found himself or herself blacklisted by private employers as well. In 1957, administrators dismissed Dr. Franklin Kameny, a Harvard-trained astronomer, from his job with the U.S. Army Map Division based upon a prior morals arrest.²³⁴ Because of the 1953 executive order, he was unemployable by federal agencies; because of the 1960 executive order, he was unemployable by private firms. Security clearances were legally necessary for scientific work. Thus, Kameny almost starved to death as he sought to adjust to a life without his chosen career.²³⁵

The atmosphere of the 1950s District would have horrified FDR and Sumner Welles. Not only did the government hunt down homosexuals, but the press and demagogic politicians did, too. The press, liberal and conservative alike, smeared opponents with the taint of perversion. Muckraking liberal Drew Pearson had a thick file on Joe McCarthy's alleged homosexuality, and journalist Hank Greenspun wrote an article alleging that McCarthy was homosexual.²³⁶ Senatorial critics of McCarthy openly referred to the bachelor status of the senator and his two oddball aides, Roy Cohn and David Schine.²³⁷ Joseph Welch, the counsel for the Army in the Army-McCarthy hearings, humiliated Cohn with public references to him as a "pixie."²³⁸ Cohn, who was homosexual, not only denied the charge, but also aggressively used it against others he disliked.²³⁹ Through Senator Bridges, Cohn is believed to have threatened Senator Lester Hunt, an anti-McCarthy Democrat from Wyoming, with publicity about his

233. See Johnson, *supra* note 2, at 48. Private sector employees working on sensitive contracts were required to have security clearances, which were routinely denied to, or revoked from, homosexuals. See U.S. DEPT OF DEFENSE, DEPARTMENT OF DEFENSE DIRECTIVE NO. 5220.6 § VI.P (1966) (prohibiting "[a]ny criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, [or] sexual perversion" by employees having clearances).

234. See Johnson, *supra* note 2, at 52-53.

235. See *id.*

236. See OSHINSKY, *supra* note 21, at 310 (1983) (quoting Drew Pearson's file: "Joe McCarthy is a bachelor of 43 years. . . . He seldom dates girls and if he does he laughingly describes it as window dressing. It is common talk among homosexuals in Milwaukee who rendezvous at the White Horse Inn that Senator Joe McCarthy has often engaged in homosexual activities."). In 1953, McCarthy married his assistant, Jean Kerr. See *id.* at 328-29.

237. See *id.* at 451-52.

238. MILLER, *supra* note 195, at 270.

239. See *id.*

son's arrest in Washington on a lewdness charge unless Hunt declined to run for reelection.²⁴⁰ Hunt withdrew from the race and, eleven days later, shot himself in his Senate office.²⁴¹

The military's anti-homosexual campaign, spurred by the 1949 Defense Department memorandum, paralleled the civil service crusade.²⁴² Reflecting the intense popular interest in talking about and vilifying homosexuality, the Navy recommended that service personnel be given three anti-homosexual indoctrination lectures; one by an officer, another by a doctor, and a third by a chaplain.²⁴³ Lectures emphasized that homosexuality was a pathological and contagious mental disease, and that homosexuals equaled sexual psychopaths who preyed upon "normal" people. Women were warned that:

A single act, or an association, may brand a woman as a sexual pervert. . . .

By her conduct a Navy woman may ruin her chances for a happy marriage. Friends should be chosen with great care. . . .

Homosexuals dread detection, social ostracism, and legal prosecution. If a woman gets entangled in homosexuality and is given an undesirable discharge or a dishonorable discharge from the Navy, she finds herself cut off from acceptable relationships with men and the companionship of normal women. She also finds it difficult to explain to her family and to her friends just why she is no longer in the Naval service. . . .²⁴⁴

Similarly, the Navy warned that "deterioration and destruction of character and integrity are the end results of homosexuality. Even such gross crimes as robbery, suicide and murder often grow out of homosexuality."²⁴⁵ Officials told men as well as women that homosexuals would use insidious methods, such as friendship and drink, to lure the heterosexual into homosexuality, and emphasized to men that homosexuality subjected them to blackmail.²⁴⁶ Service personnel

240. See *id.* at 271.

241. See *id.*

242. See LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA* 150-55 (1991); COLIN J. WILLIAMS & MARTIN S. WEINBERG, *HOMOSEXUALS AND THE MILITARY: A STUDY OF LESS THAN HONORABLE DISCHARGE* 46-53 (1971); Allan Bérubé & John D'Emilio, *The Military and Lesbians During the McCarthy Years*, in *THE LESBIAN ISSUE: ESSAYS FROM SIGNS* 279, 290-95 (Estelle Freedman et al. eds., 1985).

243. See Proposed Modifications to Recruit Training Curriculum 2, in CRITTENDEN REPORT, *supra* note 187, app. 21.

244. Chaplain's Presentation (WAVE Recruits) 2, in CRITTENDEN REPORT, *supra* note 187, app. 23.

245. *Id.* at 3.

246. See Chaplain's Presentation (Male Recruits) 1-2, in CRITTENDEN REPORT, *supra* note 187, app. 23; *id.* at 863.

were cautioned to police their same-sex friendships and to report friends they believed to be homosexual.²⁴⁷

The 1949 Department of Defense memorandum mandated a policy of separating all "known homosexuals" from the armed forces.²⁴⁸ This policy forced thousands of homosexuals into a deep closet that the government constantly tried to invade. The implementing Army regulation noted:

It is the duty of every member of the military service to report to his commanding officer any facts which may come to his attention concerning overt acts of homosexuality. Commanding officers receiving information indicating that a person has homosexual tendencies or has engaged in an act of homosexuality shall inquire thoroughly and comprehensively²⁴⁹

Like its civilian counterparts in the FBI and local police forces, the armed forces engaged in large-scale witch hunts conducted by special investigative units analogous to vice squads. An early witch hunt was that conducted by the Office of Special Investigation to track down lesbians at the Kessler Air Force Base in Biloxi, Mississippi.²⁵⁰ The investigator reportedly promised suspected lesbians general discharges if they confessed and cooperated in the investigation by naming sexual partners and other confirmed homosexuals. Eleven women were drummed out of the military with undesirable discharges, contrary to the promises. Twenty women at Lackland Air Force Base and several at Wright-Patterson were similarly kicked out. The women thus separated lost their chosen career and faced discrimination in the private job market because of the stigma of an undesirable discharge and the reason for it. Two women reportedly committed suicide.²⁵¹

Even a single premilitary experience could be the basis for a discharge. Officials repeatedly questioned personnel, seeking clues that might ultimately result in their expulsion from the closet. One former WAC recalls that officials subjected her group of 250 women to questions such as "Have you ever thought of making love to a woman?"²⁵² The WAC, an experienced lesbian, knew how to answer such an inquiry, but many of the younger, less experienced women,

247. See *Indoctrination of Male Recruits on Subject of Homosexuality 5*, in CRITTENDEN REPORT, *supra* note 187, app. 23.

248. DOD Memorandum, *supra* note 187, at 1.

249. U.S. ARMY, ARMY REG. 600-443 ¶ 5 (1950).

250. See D'EMILIO, *supra* note 20, at 45 (drawing from a letter from one of the women interrogated); Allan Bérubé & John D'Emilio, *The Military and Lesbians during the McCarthy Years*, 9 SIGNS 759, 770-74 (1984) (reprinting letters from women expelled as a result of the witch hunts at Kessler and Lackland).

251. See D'EMILIO, *supra* note 20, at 46.

252. FADERMAN, *supra* note 242, at 153 (citing Jackie Cursi, *Leaping Lesbians*, LESBIAN ETHICS, Fall 1986, at 81-83).

many probable heterosexuals, answered honestly and received expulsion.²⁵³

However, even experienced homosexuals had difficulty evading undercover military investigators. Investigators spied on homosexual bars and other hangouts and infiltrated women's softball teams under the assumption that lesbians would be disproportionately represented in an athletic sport. Notably, once military investigators had evidence, or simply accusations, against one homosexual, they could threaten that person with court martial and unfavorable publicity if he or she did not "name names."²⁵⁴ Once one person gave names, others often rushed forward, lest they receive the sucker's payoff. These tactics allowed officials to discharge 500 women from a Tokyo WAC base under less-than-honorable conditions.²⁵⁵

Surprisingly, the tangible results of this massive investment did not rise to the level one might expect. Between 1950 and 1965, the Navy cashiered an average of more than 1000 enlisted personnel per year as Class II and III homosexuals, about forty percent of the Navy's total undesirable discharges for those years.²⁵⁶ The Institute of Sex Research's Colin Williams and Martin Weinberg roughly estimate that the armed forces separated between 2000 and 3000 personnel each year for that period.²⁵⁷ An internal Navy study, the Crittenden Report of 1957, reported annual separations for homosexual charges at 1.9 per thousand for the Navy, 1.3 for the Air Force, 0.8 for the Army, and 1.6 for the Marines.²⁵⁸ The rate of discharge was much higher for women than for men.²⁵⁹ Not included are statistics depicting the number of personnel who left the armed forces before the investigations reached them or upon the slightest pressure from investigators. Thus, the number of victims of the military's anti-homosexual campaign is higher than statistics state. There is no comprehensive compilation of the actual number of destroyed careers and shattered lives that resulted from this federal campaign.

3. *Witch Hunts at the State Level*

At the same time the armed forces and other federal government branches initiated witch hunts, state and local governments took similar actions, either independently or following the federal lead. The case of Miriam Van Waters, the superintendent of the Massachusetts

253. *See id.*

254. *See id.*

255. *See id.* at 154.

256. *See WILLIAMS & WEINBERG, supra* note 242, at 52.

257. *See id.* at 46-53.

258. *See CRITTENDEN REPORT, supra* note 187, at 51-52 ("There are probably many homosexuals in the service that are never discovered.")

259. *See id.* at 40, 51.

Reformatory for Women, became one of the first significant state-level cases.²⁶⁰ In 1947, Van Waters experienced media and political attacks for treating inmates too leniently, tolerating lesbian relationships within the reformatory, and retaining lesbians as officers in positions of authority.²⁶¹ The State Commissioner of Corrections dismissed her for these and other reasons in January 1949.²⁶² To make his case, the Commissioner scoured the institution's records for descriptions of the "doll racket" and of intimacy between women.²⁶³ Many targeted Van Waters' deputy, Margaret O'Keefe, as the leader of the doll racket because of her "mannish" dress and a two-decades-old prostitution charge. Replying candidly that women did form close relationships at the reformatory and that female friendships were a good way to rehabilitate lost women, Van Waters was a sitting duck in the new climate where toleration of discreet homosexuality was anathema.²⁶⁴

The federal witch hunt that began in 1950 paralleled analogous witch hunts at the state level, the two most energetic being in Florida and California. Beginning in 1956, Florida authorized a series of "legislative investigation committees" to expose subversion in the state. Originally targeting Communists, the ACLU, and the NAACP, the Florida Legislative Investigation Committee—the Johns Committee—made homosexuality an ancillary target at first. When the Johns Committee hit legal roadblocks and lawsuits in its civil rights and Communism investigations, however, homosexuality became its main target. An account of the Committee's dynamic investigation of homosexuals in Florida is a microcosm of the anti-homosexual terror of the postwar period. It started in 1957. During May and June of that year, the Hillsborough County Sheriff's Office investigated homosexual activity at the Southwest Florida Tuberculosis Hospital in Tampa.²⁶⁵ While officials did not succeed in pinning down the main target, the hospital's Medical Director,²⁶⁶ when pressing hospital employees to name other homosexuals in exchange for escaping criminal prosecution, the Sheriff's Office learned that the dean of boys at Tampa's Plant High School was also a homosexual.²⁶⁷

260. See ESTELLE FREEDMAN, *MATERNAL JUSTICE: MIRIAM VAN WATERS AND THE FEMALE REFORM TRADITION* 291 (1996).

261. See *id.* at 267-73.

262. See *id.* at 278.

263. *Id.*

264. See *id.*

265. See Deposition, *supra* note 144.

266. See *id.* at 5-6. The Sheriff's Office claimed to have evidence of the Medical Director's homosexual acts with 16 different boys and men in Tampa. See *id.* The Medical Director ultimately resigned and moved out of state. See *id.* at 6.

267. See *id.* at 4.

With that knowledge, the Sheriff's Office and the Hillsborough County School Board cooperated in a two-month investigation during mid-1957. The investigator started with a list of suspected homosexuals and expanded the list by getting the "admitted homosexuals" to name other names, by staking out lesbian and gay bars in Tampa (Knotty Pine for men, Jimmie White's for women), and by cultivating informers for new leads.²⁶⁸ Pursuing a tip, Deputy Bob Cash led an expedition to Anna Maria Island, where fifty-four female school teachers had obtained a weekend apartment and were observed in lesbian activities.²⁶⁹ By the end of the investigation, the Sheriff's Office had names of eight to ten admitted lesbian teachers, fifteen to seventeen homosexual male teachers, and twenty-five to thirty others named by the confirmed homosexuals as also being gay.²⁷⁰ The investigation ceased when school resumed in the fall of 1957. The chief investigator was told he only uncovered approximately ten percent of the homosexuals in the Hillsborough County school system.²⁷¹

Based on claims that Hillsborough County public school teachers had been initiated into homosexuality while attending the University of Florida and Florida State University, the Johns Committee, led by chief investigator R.J. Strickland, investigated UF from 1958-60 and FSU from 1959-61. The Committee's 1959 report set forth a factual basis for finding a state emergency that justified extensive investigation:

1. The existence of homosexual practices among faculty members and students in our public educational system is an established fact, the extent of which is, to the Committee, absolutely appalling.

4. The practicing homosexual is, almost entirely, the product of environment and practice. . . . In other words, homosexuals are made by training, rather than born.

5. The greatest danger of a homosexual is his or her recruitment of other people into such practices.

6. A surprisingly large percentage of young people are subject to be influenced into homosexual practices if thrown into contact with homosexuals who desire to recruit them. . . . Some of the State's instructional personnel at the higher educational level have been and are recruiting young people into homosexual practices and these young people have been and are becoming teachers in the public school system of Florida, and some of them are recruiting teen-age students into homosexual practices.²⁷²

268. *See id.*

269. *See id.* at 10.

270. *See id.* at 11.

271. *See id.* at 12.

272. FLA. LEGIS. INVESTIGATION COMM., REPORT OF THE FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE TO THE 1959 SESSION OF THE LEGISLATURE 4-5 (1959) (available at Fla. Dep't of State, Div. of Archives, ser. 1486, carton 1, Tallahassee, Fla.).

In its final report, the committee stated:

The homosexual's goal and part of his satisfaction is to "bring over" the young person, to hook him for homosexuality.

Whether it be with youth or older individuals, homosexuality is unique among the sexual assaults considered by our laws in that the person affected by the practicing homosexual is first a victim, then an accomplice, and finally himself a perpetrator of homosexual acts.²⁷³

Inspired by this view of the world, the Johns Committee conducted a roving investigation of homosexuals in public education. The investigators shared the names of suspected homosexuals with local authorities and used the information and local resources to extract confessions, details, and more names from the suspects.²⁷⁴ In return for assurances against criminal prosecution, many of the suspects resigned or were terminated.²⁷⁵ The Committee also fed names to the Florida Board of Education and pressured it to revoke teachers' certificates. Although the Board dragged its feet, the Legislature pressed it with a 1959 statute authorizing certificate revocation for "moral turpitude"²⁷⁶ and a 1961 statute setting forth expedited procedures for revocation.²⁷⁷ Near the end of its rolling tenure, the Johns Committee summarized the tangible fruits of its investigations by noting that since 1959, sixty-four public school teachers' teaching certificates had been revoked, with eighty-three additional revocations pending.²⁷⁸ The Johns Committee pressed state agencies to seek out and discharge homosexuals, and served as a clearinghouse for gathering and distributing names of known or suspected homosexuals to federal as well as state agencies. The Committee informally reported in 1964 that thirty-seven federal employees were removed because of its efforts; fourteen state employees faced removal proceedings.²⁷⁹ According to the University of Florida's records, sixteen students (fourteen men and two women) were suspended or withdrew from the university, and twenty-five students (nine men

273. FLA. LEGIS. INVESTIGATION COMM., *supra* note 15, at 10.

274. *See generally id.*

275. *See generally id.*

276. Act effective July 1, 1959, ch. 59-404, § 1, 1959 Fla. Laws 1377, 1377 (current version at FLA. STAT. § 231.28 (1995)).

277. *See* Act effective June 22, 1961, ch. 61-396, § 2, 1961 Fla. Laws 754, 754 (current version at FLA. STAT. § 231.28 (1995)) (not requiring an investigation prior to revocation).

278. *See* FLA. LEGIS. INVESTIGATION COMM., *supra* note 15, at 13. According to an internal file memo, prepared later, 71 public school teachers lost their certificates (63 cases pending), and 14 university professors were fired (19 cases pending).

279. *See* FLA. LEGIS. INVESTIGATION COMM., REVOCATION MEMORANDUM (1964) (available at Fla. Dep't of State, Div. of Archives, ser. 1486, carton 1, Tallahassee, Fla.).

and sixteen women) were placed on academic probation as a result of the Committee exposing their homosexual activities.²⁸⁰

The intangible effects of the investigations can only be imagined. Teachers, students, and state employees fell under suspicion when spotted at places investigators considered homosexual hangouts or when named by other suspected homosexuals. Once suspected, investigators subjected suspects to closed-door questioning about the suspects' sexuality, almost always without a lawyer present. For many of those questioned, the experience proved demeaning as well as terrifying. One woman from Tampa wrote the Committee objecting to the

vulgar questioning, abuse and undignified treatment . . . of anyone suspected or vaguely connected with homosexuality.

Must I be stripped of my privacy and all the pride and dignity that I enjoy as an American, simply because some element in my environment, some incident in my childhood, or some faulty parental relationship has produced an individual who chooses to love one of the same sex?²⁸¹

My account of Florida's witch hunt is unusually rich in detail, not only because the Johns Committee kept such extensive records, but also because Florida probably invested more resources into its witch hunt than any other state. Maintaining an apartheid of the closet seemed not as pressing elsewhere. Other southern states, as well as the sparsely populated states of the plains and the western mountains, did not have homosexual subcultures prominent enough to raise alarms. However, their representatives in Washington, D.C., such as Clyde Hoey (North Carolina), Kenneth Wherry (Nebraska), and Pat McCarran (Nevada) played key roles in legislating against homosexuality on the national level. Urbanized states in the east and the midwest had prominent homosexual subcultures that were anathema to mainstream society. However, the regulators there probably felt that it would be excessively expensive to eradicate subcultures entirely, as Florida sought to do. Florida's only rival was California, which was similar in its geographical and cultural heterogeneity. Like Florida, California possessed urban enclaves with prominent homosexual subcultures situated near rural and suburban areas featuring more conventional lifestyles.

Similar to Florida and most states, California's public agencies and school boards would not hire and would terminate employees

280. See Memorandum from William A. Tanner, Security Officer, University of Florida, to Dr. Gordon W. Blackwell, President, University of Florida 19-20 (Jan. 31, 1961) (available at Fla. Dep't of State, Div. of Archives, ser. 1486, carton 1, Tallahassee, Fla.).

281. FLA. LEGIS. INVESTIGATION COMM., *supra* note 15, at 8. The author signed the letter, "Just a Girl of 24." *Id.*

who engaged in "immoral conduct."²⁸² California's Board of Education also refused to issue or would revoke teaching certificates for immoral conduct.²⁸³ Typically, authorities interpreted "immoral conduct" to include acts of same-sex intimacy. Thus, an employee of the state convicted of sodomy or oral copulation could expect to lose his or her teaching certificate and job. Reflecting the widespread view of the closet as straight-threatening, California expanded the bases for revoking teaching certificates to include any conviction for specified sex crimes, including lewd vagrancy and loitering at a public toilet, both misdemeanors, as well as sodomy and oral copulation, both felonies.²⁸⁴ California vigorously applied the statutes to exclude homosexuals from public employment.

The leading case construing the 1952 amendments was *Sarac v. State Board of Education*.²⁸⁵ Authorities arrested Thomas Sarac, Jr., a secondary school teacher, under the lewd vagrancy misdemeanor statute for soliciting sex from a decoy cop on the beach. He pled guilty to a lesser charge of indecent conduct violating a municipal ordinance.²⁸⁶ The California appeals court upheld the revocation of Sarac's teaching certificate based upon this offense and rejected his argument that there was no connection between a minor morals charge and his fitness to teach:

In view of [Sarac's] statutory duty as a teacher to "endeavor to impress upon the minds of the pupils the principles of morality" and his necessarily close association with children in the discharge of his professional duties as a teacher, there is to our minds an obvious rational connection between his homosexual conduct [and the revocation of his teaching certificate].²⁸⁷

Sarac reflects the aggressiveness with which California monitored sexual conduct of teachers. Administrators reported convictions or guilty pleas for any kind of sexual offense to state agencies, including the California Board of Education, so that appropriate civil penalties could be imposed. Thereafter, California required applicants for teaching credentials to furnish their fingerprints so that the Board of Education could check them against national and state fin-

282. *E.g.*, CAL. EDUC. CODE § 24306(a) (West 1954) (addressing state college employees); CAL. GOV'T CODE § 19572(1) (West 1954) (addressing all state civil service workers).

283. See CAL. EDUC. CODE §§ 13202, 13209 (West 1960).

284. See Act effective July 2, 1952, ch. 25, § 5, 1952 Cal. Stat. 389, 390 (current version at CAL. EDUC. CODE § 44436 (West 1996)) (depriving teachers of their certificates if convicted of sex crimes); *id.* § 2, 1952 Cal. Stat. at 390 (current version at CAL. EDUC. CODE § 44010 (West 1996)) (specifying the sex crimes triggering the penalty in section 44346).

285. 57 Cal. Rptr. 69 (Dist. Ct. App. 1957).

286. See *id.* at 71.

287. *Id.* at 72-73. Adding insult to injury, the court stated: "Homosexual behavior has long been contrary and abhorrent to the social mores and moral standards of the people of California as it has been since antiquity to those of many other peoples." *Id.* at 72.

gerprint records of convicted criminals.²⁸⁸ The same 1951 law required the State Bureau of Criminal Identification and Investigation to furnish the Board of Education with "all information pertaining to any applicant of whom there is a record in its office."²⁸⁹

In addition to regulating teachers, most states also denied or revoked professional licenses due to homosexuality. In California, "gross immorality" served as a statutory basis for state disciplinary action against doctors, dentists, pharmacists, funeral directors, embalmers, and guardians.²⁹⁰ The most common basis for revoking a professional license or certificate in California was conviction of a "crime involving moral turpitude."²⁹¹ In the 1950s, any misdemeanor or felony conviction involving homosexual activity sufficed as a crime involving moral turpitude.²⁹² In a leading case, California disbarred attorney Arthur Boyd in 1955 because he pled guilty to a misdemeanor charge of lewd vagrancy.²⁹³ The California State Bar Association argued that even such a minor charge produced sufficient evidence of "depravity" and behavior contrary to custom.²⁹⁴ A medical doctor reportedly lost his license because he pled guilty to a misdemeanor charge of public indecency, a crime that did not require registration under California's sex offender law.²⁹⁵

Generally, state bar associations, unlike school boards, did not actively seek out evidence of homosexuality during this period. Florida's disbarment of Ronald Kay in 1966 presented an interesting twist on this rule.²⁹⁶ Based upon his conviction of indecent exposure under a Fort Lauderdale ordinance, Kay was disbarred, in part because the indecency was homosexual in nature.²⁹⁷ The Board of Governors of The Florida Bar then added: "In addition to [Kay's] homosexual activity, the referee found a lack of candor and serious conflicts in [Kay's] testimony at the criminal and disciplinary hearings."²⁹⁸ There is little doubt that Kay did prevaricate. His case reflects the

288. See Act effective Sept. 22, 1951, ch. 1482, § 1, 1951 Cal. Stat. 3459, 3459 (current version at CAL. EDUC. CODE § 44341(a) (West 1996)).

289. *Id.* (current version at CAL. EDUC. CODE § 44341(c) (West 1996)).

290. CAL. BUS. & PROF. CODE § 1680(e) (West 1975) (dentists); *id.* § 2361(d) (doctors); *id.* § 3105 (optometrists); *id.* § 4356 (pharmacists); *id.* § 7698 (funeral directors and embalmers); CAL. PROB. CODE § 1580(4) (West 1954) (guardians).

291. *E.g.*, CAL. BUS. & PROF. CODE § 1000-10(b) (West 1954) (chiropractors); *id.* § 1679 (dentists); *id.* § 2383 (doctors); *id.* § 2660(b) (physical therapists); *id.* § 3107 (optometrists); *id.* § 4354 (pharmacists); *id.* § 6775 (engineers).

292. See, *e.g.*, *United States v. Flores-Rodriguez*, 237 F.2d 405, 409 (2d Cir. 1956) (loitering about a public toilet soliciting men for sex is a "crime [of] moral turpitude" for immigration law purposes).

293. See *In re Boyd*, 307 P.2d 625, 625 (Cal. 1957).

294. See *id.*

295. See Wood, *supra* note 77, at 21-22.

296. See *Florida Bar v. Kay*, 232 So. 2d 378, 379 (Fla. 1970).

297. See *id.*

298. *Id.*

dilemma the closet presented to gay people: honesty about one's homosexuality meant social death, but lying was dishonest and justified additional legal censure. The impressive array of state regulations and inquiries brigading sexual orientation forced the homosexual to talk, but he or she faced destruction by speaking.

C. State Suppression of Homosexual Association and Expression

Evidence of a homosexual subculture, embodied in educational organizations, homophile or homoerotic literature, and bars and social clubs, also alarmed homophobic America. Censors and spies monitored and harassed this subculture. Consistent with the 1950s apartheid of the closet, state censors sought to suppress public displays of homosexuality, and homosexuals themselves cooperated. Early homophile organizations, such as the Mattachine Society and the Daughters of Bilitis, operated under mysterious names having no visible connection to homosexuality. Most members of those societies knew each other only by pseudonyms. Their publications spoke cautiously about homosexuality, rarely affirming it as a normal condition and mostly begging for toleration. Their most systematic theoretician, Edward Sagarin, wrote under the pen name Donald Webster Cory. Homoerotica was also closeted. A deviance gendarmerie sought to flush out, intimidate, and ultimately destroy networks of information and support that might attract new "recruits" to homosexuality by infiltrating the homosexual underground and harassing its denizens.

Mark this irony of the closet as it was configured in the 1950s. Alarmed that homosexual subcultures posed a challenge to gender and sexual orthodoxy during a period of renormalization, mainstream America sought to suppress homosexual expression in any form (solicitation, intercourse, socialization, stories). However, the acts of state suppression of homosexual expression were in practice acts instigating such expression.²⁹⁹ The developments traced above reflected an intensification of discourse about homosexuality that contributed to the formation of the closet as a phenomenon where straight society insisted on constant interrogation about a topic that had been socially taboo earlier in the century. Suspected homosexuals were lured into conversations with state actors, including decoy cops, army shrinks, military commanders and investigators, the FBI, PHS doctors and INS agents, federal civil service and security clearance officials, local and state boards of education, state bar associations and other professional review boards, censors, customs officials,

299. This paradox is inspired by 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (Robert Hurley trans., 1978). See the discussion of Foucault in chapter three of WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* (1997).

and alcoholic beverage control boards and their undercover agents. These conversations themselves often intensified people's perception of their perverse sexual feelings.

1. *Surveillance and Harassment*

Starting no later than 1937, FBI Director J. Edgar Hoover maintained private files containing reports about the homosexuality of prominent people.³⁰⁰ One of the files contained 160 pages from 1941-42 investigative reports dealing with the sexual adventures of Sumner Welles.³⁰¹ Hoover may have been the leak precipitating Welles' resignation in 1943.³⁰² Another eighty-five-page file compiled between May 20 and June 27, 1942, reported that Senator David Walsh, the chair of the Senate Naval Investigations Committee, frequented a house of male prostitution "where homosexuals engaged in espionage activity visited."³⁰³ The file did not mention that the U.S. Navy was working with the House to entrap foreign or double agents. Several files suggested that the FBI Director himself was "queer."³⁰⁴

After World War II, the FBI became a national clearinghouse for information about homosexuals.³⁰⁵ The Hoey Subcommittee criticized the Civil Service Commission for not knowing that 457 of the "perverts" arrested in D.C. between 1947 and 1950 were federal employees, who should have been fired.³⁰⁶ In April 1950, the District's police department turned over all its perversion arrest records to the FBI. The subcommittee charged the FBI to serve as a clearinghouse for this information and then to channel it to the Civil Service Commission.³⁰⁷ The FBI aggressively attacked this duty and expanded its charge to include surveillance of homosexuals, their organizations, and their political activity, as well as investigations of people associating with known homosexuals.³⁰⁸

Once FBI agents gathered the information, the FBI used it in various ways not mentioned in the Hoey Subcommittee report, including leaks to local officials and employers and interrogation to pry out the names of other homosexuals. In a remarkable statement

300. See JONATHAN NED KATZ, *GAY/LESBIAN ALMANAC: A NEW DOCUMENTARY* 530-31 (1983). The FBI partially declassified and released these files, albeit with names deleted, under the Freedom of Information Act. See *id.* at 530.

301. See *id.*

302. See *id.*

303. *Id.* at 530-31.

304. *Id.* at 531.

305. See J. Edgar Hoover, *Role of the FBI in the Federal Employee Security Program*, 49 NW. U. L. REV. 333, 336 (1954).

306. See *EMPLOYMENT OF HOMOSEXUALS IN GOVERNMENT*, *supra* note 197, at 12-13.

307. See Hoover, *supra* note 305, at 335.

308. See *id.* at 336.

made to the ACLU, a person identified only as "B.D.H." described how the FBI pursued him for more than a decade after the University of Illinois expelled him for making a pass at a fellow student.³⁰⁹ FBI agents followed B.D.H. from job to job, informing employers and colleagues of his homosexuality and thereby making working conditions impossible.³¹⁰ When an injury impelled B.D.H. to seek job retraining, the Illinois Division of Vocational Rehabilitation refused to train him because of his sexual orientation.³¹¹ FBI agents repeatedly pressed him to name other homosexuals.³¹²

The FBI showed even more interest in the activities of groups. In 1951, Harry Hay and a small circle of friends, some of whom had served in the military, formed a secret homophile society known as The Mattachine Foundation.³¹³ As the circle expanded, it incorporated under California law on April 27, 1953, and changed its name to the Mattachine Society the following month.³¹⁴ In January 1953, the first mass circulation homophile journal, *One*, was published by members of the Mattachine, albeit in a separate organizational form.³¹⁵ The Society itself published the *Mattachine Review* starting in 1955.³¹⁶ Although there were some women in the Mattachine, Del Martin and Phyllis Lyon formed the Daughters of Bilitis, a separate organization, in the autumn of 1955.³¹⁷ Beginning in October 1956, the Daughters published *The Ladder* "with the vague idea that something should be done about the problems of Lesbians, both within their group and with the public."³¹⁸

The FBI initiated an internal security investigation into the Mattachine Society in the spring of 1953 and started a more open-ended file on the Daughters of Bilitis in the summer of 1959.³¹⁹ Although Hay and other Mattachine members had been Communist Party members or sympathizers before the war, by December 1953, the FBI recognized the Mattachine as completely "law-abiding."³²⁰ The

309. See D'EMILIO, *supra* note 20, at 47.

310. See *id.*

311. See *id.*

312. See *id.*

313. See *id.* at 61-62.

314. See *id.* at 63-73; STUART TIMMONS, *THE TROUBLE WITH HARRY HAY, FOUNDER OF THE MODERN GAY MOVEMENT*, 129-53 (1990).

315. See D'EMILIO, *supra* note 20, at 72-73.

316. See *id.* at 89.

317. See *id.* at 102.

318. *THE LADDER*, Oct. 1956, at 2.

319. The discussion that follows is drawn from the FBI Freedom of Information Act files on the Mattachine Society (Files 100-403320 (Headquarters), 100-4588 (Los Angeles), 100-132065 (New York), 100-37394 (San Francisco), 100-33796 (Washington, D.C.)) and the Daughters of Bilitis (File 94-843).

320. Memorandum from FBI Los Angeles Office to FBI Headquarters 6 (Dec. 31, 1953) (reporting that the goals of the Society were "to accomplish these aims in a law-abiding manner. Homosexuals are not seeking to overthrow or destroy any of society's existing

FBI never suspected the Daughters of Bilitis of being internal security threats. Yet FBI agents infiltrated both organizations, archived their declarations and publications, reported their meetings and activities, recruited informants, compiled lists of members, and speculated on their influence and future activities.

The FBI's internal documents do not reveal how it deployed surveillance information, but they do reveal the details of the Bureau's most direct interaction with the homophile organizations. The November 1955 issue of *One* contained an article by David L. Freeman, entitled *How Much Do You Know About the Homosexual Male?* Freeman alleged that "Tory" homosexuals, or deeply closeted insiders, worked for *Time* and *Newsweek* magazines, served in the diplomatic corps, and "occupied key positions with oil companies or the FBI."³²¹ This phrase came to the attention of FBI Director J. Edgar Hoover and his associate Clyde Tolson in January 1956. According to FBI records, Tolson responded, "I think we should take this crowd on and make them 'put up or shut up.'"³²² Hoover concurred.³²³ On January 27, the FBI instructed its Los Angeles office to locate Freeman and determine, among other things, precisely which FBI authorities he had in mind.³²⁴ On January 31 and February 2, FBI agents visited *One's* offices in search of Freeman, who was nowhere to be found.³²⁵ The sole occupant of the office, Dorr Legg, refused to identify Freeman or the FBI officials suspected of being homosexual.³²⁶ The FBI agents told Legg that "the FBI would not tolerate any such baseless allegations in [*One*] or any other publication."³²⁷ Freeman was not located, and the Los Angeles office requested further directions.

FBI Headquarters responded with an ambitious plan of action. It directed the Los Angeles Office to:

1. Open an investigation on [Legg] and to develop any further derogatory information concerning him and to determine the extent of his association with [Freeman].

institutions, laws or mores, but to be assimilated as constructive, valuable and responsible citizens."). The agent in charge closed the FBI "internal security" file on Mattachine because there was clearly no subversive activity going on.

321. David L. Freeman, *How Much Do You Know About the Homosexual Male*, *ONE*, Nov. 1955, at 15.

322. Memorandum from Special Agent M.A. Jones to Mr. Nichols, FBI Headquarters 1 (Feb. 10, 1956) [hereinafter Jones Memorandum].

323. *See id.*

324. *See* Air-Telegram from J. Edgar Hoover, Director, FBI, to FBI Los Angeles Office 1 (Jan. 27, 1956). There were rumors throughout Hoover's career of a liaison between him and Tolson.

325. *See* Jones Memorandum, *supra* note 322, at 1.

326. *See id.*

327. Air-Telegram from Special Agent Malone, FBI Headquarters, to FBI Los Angeles Office 3 (Feb. 2, 1956).

2. Conduct background investigation regarding [unknown] and develop further information regarding "One" and One, Inc. Determine how magazine is financed and if it's properly registered to do business in California.

3. Contact postal authorities concerning the mailability of "One" and obtain pertinent information in possession of Post Office.

4. Consideration should also be given to referring the November, 1955 issue of "One" to Department [of Justice] for its opinion concerning the [criminal] obscenity of this issue.³²⁸

Apparently, the FBI's standard operating procedure involved focusing its attention on an enemy of the people and then devoting its substantial investigative resources to digging up "derogatory information" for strategic use. Its network of federal and state officials could then be instructed to apply other kinds of legal sanctions or pressure against the enemy. Although the Bureau never discovered the identity of Freeman (he was the pen name for Chuck Rowland), it did notify the employers of others who wrote for *One*, *Mattachine Review*, and *The Ladder*—with the expectation that the homophiles would lose their jobs.³²⁹

2. Censorship of Homophile Media

Both federal and state law criminalized the promulgation of "obscene" publications.³³⁰ The Tariff Act of 1930, enforced by the Customs Service, prohibited the importation from abroad of such publications.³³¹ The Comstock Act of 1873 prohibited the Post Office from handling "[e]very obscene, lewd, lascivious, indecent, filthy, or vile article."³³² These laws were all in effect before World War II, but the postwar anti-homosexual terror stimulated official use of these laws as another criminal sanction against homosexuals. None of these statutes defined what they meant by "obscene," but the social consensus in the 1940s was that any positive discussion of homosexuality could be considered "obscene." This understanding chilled the development of a homophile press. The earliest continuously promulgated

328. Jones Memorandum, *supra* note 322, at 1a-b.

329. See RODGER STREITMATTER, *UNSPEAKABLE: THE RISE OF THE GAY AND LESBIAN PRESS IN AMERICA* 32 (1995). The homophiles apparently kept their jobs, notwithstanding the FBI's efforts.

330. See, e.g., CAL. PENAL CODE § 311 (West 1955); N.Y. PENAL LAW § 1141 (McKinney 1944). These were the most widely invoked criminal obscenity statutes.

331. See Smoot-Hawley Tariff Act of 1930, ch. 497, § 305(a), 46 Stat. 590, 688 (codified as amended at 19 U.S.C. § 1305(a) (1994)); see also JAMES C.N. PAUL & MURRAY SCHWARTZ, *FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL* 55-63 (1961).

332. Comstock Act of 1873, ch. 258, § 2, 17 Stat. 598 (current version at 18 U.S.C. § 1461 (1994)); see also HEYWOOD BROUN & MARGARET LEECH, *ANTHONY COMSTOCK: ROUNDSMAN OF THE LORD* 128-144 (describing Comstock's service in Congress) (1927); ROBERT W. HANEY, *COMSTOCKERY IN AMERICA: PATTERNS OF CENSORSHIP AND CONTROL* 34-35 (1974); PAUL & SCHWARTZ, *supra* note 331, at 22-24.

homophile journal was *Vice Versa*, a mimeo produced by "Lisa Ben" (an anagram for "Lesbian") in Los Angeles between June 1947 and February 1948.³³³ The journal included short stories, articles about police violence against lesbians and raids on lesbian bars, and essays on issues such as same-sex marriage. Each issue was distributed to friends and acquaintances, who passed them on to others. According to the editor, "I had no idea how daring or dangerous this was. I used to mail them blithely out from the place where I worked, until somebody said, 'Don't you know you could get into trouble for mailing this?'"³³⁴ Lisa Ben was more cautious after that warning, never sending issues through the mail and discontinuing the publication when she lost her private office where she had typed earlier issues without fear of detection.

Perhaps fearful of censorship, gay authors during this period either closeted homosexuality through indirect references, as Tennessee Williams did in *A Streetcar Named Desire* and John Burns did in *Lucifer with a Book*, or depicted homosexual characters as destructive sex maniacs, as Gore Vidal did in *The City and the Pillar*. Notwithstanding these fears, a homophile literature and press did develop in the early 1950s. At that point, state and federal censors were faced with the decision whether to put up or shut up. The censors accomplished something of both, as they sporadically sought to suppress important gay work.

In the case of Allen Ginsberg's frankly (homo)sexual publication, *Howl and Other Poems*,³³⁵ suppression occurred at both the federal and state level.³³⁶ In 1956, *Howl's* first printing passed the Customs Service in New York, and Lawrence Ferlinghetti's City Lights bookstore offered it for sale. In San Francisco, however, Collector of Customs Chester McPhee confiscated *Howl's* second printing. "The words and the sense of the writing is obscene," said McPhee. "You wouldn't want your children to come across it."³³⁷ Ferlinghetti thereupon printed a domestic edition of the work and offered it for sale. In June, Captain William Hanrahan of the Juvenile Division of the San Francisco Police Department seized all copies of *Howl* and arrested Ferlinghetti and his sales clerk, Shigeyoshi Murao, for selling the obscene works of *Howl* and William Margolis' *The Miscellaneous Man*.³³⁸

333. See STREITMATTER, *supra* note 329, at 1-16 (describing the history of *Vice Versa*).

334. *Id.* at 5 (quoting interview with Lisa Ben).

335. ALLEN GINSBERG, *HOWL: ORIGINAL DRAFT FACSIMILE ETC.* (Barry Miles ed., 1986).

336. See Dal McIntire, *Tangents*, ONE, May 1957, at 11-12; HANEY, *supra* note 332, at 34-45.

337. Lawrence Ferlinghetti, *Horn on Howl*, EVERGREEN REVIEW, Dec. 1957, at 145, reprinted in GINSBERG, *supra* note 335, at 169-70.

338. See *id.*

Other artistic works censored because of their homosexual themes included the eighteenth-century bawdy novel *The Memoirs of a Woman of Pleasure (Fanny Hill)*, which was banned in Boston but permitted in New York; Vin Packer's *Spring Fire* (1952) and Fay Adams' *Appointment in Paris* (1952), which were effectively black-listed by local censors because of their sympathetic depiction of lesbian romance; and William Talsman's saucy story of gay New Orleans, *The Gaudy Image* (1958), which was seized by the Customs Service and never made available in the United States.³³⁹ Dreadful books such as Simon Eisner's *Naked Storm* (1952) and Fletcher Flora's *Strange Sisters*³⁴⁰ (1954) received a free ticket from the censors because their lurid depictions of sexual violence were anti-lesbian.

Censors also targeted homosexual erotica, which barely existed in the 1950s. Herman Womack published a series of male physique magazines, *MANual*, *Trim*, and *Grecian Guild Pictorial*.³⁴¹ The magazines contained photographs of attractive, usually seminude male models, who posed with their buttocks exposed, their legs spread, their pubic hair showing, or the suggestion of an erect penis under a sheer cover.³⁴² The models sometimes appeared in pairs, in leather garb, or with swords and other long, pointed objects to emphasize homoerotic possibilities.³⁴³ On May 25, 1960, the Alexandria, Virginia, Postmaster seized 405 copies of the magazines pursuant to the Comstock Act.³⁴⁴ Finding that the magazines appealed only to the prurient interest of "sexual deviates" and had no literary or other merit, the Judicial Officer of the Post Office determined that the books were "non-mailable."³⁴⁵

An even odder instance of postal censorship involved *One*. In April 1954, Senator Alexander Wiley, Joe McCarthy's ally and colleague from Wisconsin, wrote the Postmaster General protesting the willingness of the Post Office to carry a magazine "devoted to the achievement of sexual perversion."³⁴⁶ He maintained that its "lewd" and "obscene" contents were inconsistent with President Eisenhower's

339. For more detailed accounts of lesbian and gay novels and their occasional censorship, see JEANNETTE H. FOSTER, *SEX VARIANT WOMEN IN LITERATURE* (1956); AUSTEN, *supra* note 12, at 153.

340. *Strange Sisters* opens with the knifing of a man by a girl having variant tendencies because she was seduced by an older woman.

341. See *Manual Enter., Inc. v. Day*, 370 U.S. 478, 489 n.13 (1962). The account that follows is taken from the briefs and the Court's opinion.

342. See *id.* at 489 n.13.

343. See *id.*

344. See *id.* at 481.

345. *Id.* However, the United States Supreme Court found that these magazines should not have been suppressed by the Post Office. See *id.* at 495.

346. Letter from Senator Alexander Wiley to Arthur Summerfield, Postmaster General (Apr. 28, 1954).

anti-homosexual internal security program.³⁴⁷ In response to this pressure, Los Angeles Postmaster Otto Oleson sent a copy of each issue of *One* to the central Post Office for evaluation as lewd or obscene under the Comstock Act.³⁴⁸ The Post Office determined that the October 1954 issue was obscene and lewd, based upon three articles within the issue: (1) *Sappho Remembered*, a story of a lesbian's affection for a twenty-year-old "girl" who gives up her boyfriend to live with the lesbian, was considered obscene because it was "lustfully stimulating to the average homosexual reader"; (2) *Lord Samuel and Lord Montagu*, a poem about homosexual toilet cruising on the part of several British peers, was considered obscene because of "filthy words" within it; and (3) an advertisement for *The Circle*, a magazine containing homosexual pulp romance stories, was thought to lead the reader to obscene material.³⁴⁹ Based on these findings, the Post Office determined the issue to be "non-mailable" and returned all copies to the sender in December 1954.³⁵⁰ Pursuant to a 1950 statute, the Post Office also had the power to impound mail flowing to any person found to be using the mails to provide information about any "obscene" thing.³⁵¹ The Department of Justice also had authority to seek criminal prosecution of persons who mailed obscene publications through the mails.³⁵² Neither of these latter powers were utilized against *One*. Issues following the October 1954 edition were allowed to circulate, pending *One's* legal challenge to the censorship.

Movies in the postwar period contained few explicit references to homosexuality, partly because of the voluntary Motion Pictures Code adopted by the industry in 1934. Particular Application II.4 provided that "[s]ex perversion or any inference to it is forbidden."³⁵³ To obtain the Code imprimatur necessary for national distribution of a movie, the producers had to satisfy the Code censors that their movie did not refer to sex perversion.³⁵⁴ This often required a negotiating proc-

347. See *id.*

348. See *One, Inc. v. Olesen*, 241 F.2d 772, 773 (1957) (holding that the Post Office's determination that *One* was not mailable was not arbitrary and capricious), *rev'd per curiam*, 355 U.S. 371 (1958).

349. *Id.* at 774.

350. *Id.* at 773.

351. Act of Aug. 16, 1950, ch. 721, 64 Stat. 451 (current version at 39 U.S.C. § 3006 (1994)). In 1956, Congress confirmed that the Post Office had the authority to invoke this impoundment power, albeit for just 20 days, without a hearing or an order from the courts. See Act of July 27, 1956, Pub. L. No. 821, ch. 755, 70 Stat. 699.

352. See Comstock Act of 1873 § 2, 18 U.S.C. § 1461 (1994).

353. Motion Picture Producers and Distributors of America, Inc., *A Code to Govern the Making of Motion and Talking Pictures*, (June 13, 1934) [hereinafter MPPDA Code], reprinted in MORRIS L. ERNST & ALEXANDER LINDEY, *THE CENSOR MARCHES ON* 317 (1940). Application II.3 specified that "Seduction or Rape" . . . "should never be more than suggested, and only when essential for the plot." MPPDA Code, *supra*.

354. See ERNST & LINDEY, *supra* note 353, at 86.

ess in which movies were cut or rewritten to satisfy censors.³⁵⁵ The Tennessee Williams plays brought to the silver screen in the late 1950s—*Cat on a Hot Tin Roof*, *A Streetcar Named Desire*, and *Suddenly Last Summer*—bristled with homosexuality, which was required to be closeted for the films to receive Code approval.³⁵⁶

Still, the state censor played a key role in discouraging mention of homosexuality in movies. The Customs Service monitored foreign films and freely impounded sexually oriented movies such as *491*, a Swedish film that included explicit scenes of homosexual fantasies and man-boy sex. Foreign and domestic films willing to seek distribution without Code imprimatur were also subject to state and municipal censorship. Like many other cities, Los Angeles, required theaters to obtain municipal licenses in order to show films³⁵⁷ and prohibited movies depicting "any immoral, indecent, lewd, lascivious or unlawful act, suggestion, business or purpose."³⁵⁸ Like some states, New York required moviemakers to obtain a license from the Department of Education and prohibited licenses for movies that were "obscene, indecent, immoral," and the like.³⁵⁹ In 1954, responding to a U.S. Supreme Court decision requiring better notice as to what was allowed, New York defined a film as "immoral" if "the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior."³⁶⁰ Laws like this one provided a third level of censorship, behind the Motion Pictures Code and federal Customs Service.

3. Closing Down Homosexual Socialization

Federal as well as state and local officers conducted anti-homosexual surveillance and censorship, but state and local governments alone suppressed homosexual socialization. Bars and restaurants served as the main public places for same-sex socialization. These were critical locations for the formation of homosexual subcultures, especially for lesbians, who had fewer locations for socialization than gay men. Lesbian-friendly bars and restaurants nurtured the 1940s and 1950s "butch-fem" lesbian subculture.³⁶¹

355. See *id.* at 89.

356. See VITO RUSSO, *THE CELLULOID CLOSET: HOMOSEXUALITY IN THE MOVIES* 115-18 (rev. ed. 1985).

357. See LOS ANGELES, CAL., CODE § 23.15 (1946).

358. *Id.* § 41.13(a). The ordinance authorized the police to seize any motion picture violating subsection (a). See *id.* § 41.13(b).

359. N.Y. EDUC. LAW § 122 (1921) (repealed 1983).

360. Act effective April 12, 1954, ch. 620, § 1, 1954 N.Y. Laws 1494, 1494 (repealed 1983).

361. See ELIZABETH LAPOVSKY KENNEDY & MADELINE D. DAVIS, *BOOTS OF LEATHER, SLIPPERS OF GOLD: THE HISTORY OF A LESBIAN COMMUNITY* 70-76 (1993).

Big cities had several lesbian bars, as well as bars entertaining mixed crowds of lesbians and gay men, or gays and tolerant straights, as did many medium-sized cities such as Buffalo and Tampa.³⁶²

The state's primary response to these institutions was harassment through occasional police raids. Police raids, especially when newspapers printed the names of those detained, were particularly effective in communities with small lesbian and gay populations. A more powerful regulatory weapon emerged after the repeal of Prohibition in 1933. Rather than prohibiting liquor, the state became the vendor or the licenser of liquor sales in bars, taverns, hotel, and other establishments. In most states, liquor licensing statutes or agency regulations required that licensees be of "good moral character" and that licensed establishments not permit "disorderly" behavior on the premises.³⁶³ Violation of these conditions meant that a liquor license—and hence the establishment's main source of income—could be suspended or revoked by the liquor commission or alcoholic beverage control board. New York's Alcoholic Beverage Control Law of 1934 required that "[n]o person licensed to sell alcoholic beverages shall suffer or permit any gambling on the licensed premises, or suffer or permit such premises to become disorderly."³⁶⁴ The State Liquor Authority (SLA) interpreted "disorderly" in *pari materia* with the state disorderly conduct statute, which specifically applied to anyone who "loiter[ed] about any public place soliciting men for the purpose of committing a crime against nature or other lewdness."³⁶⁵ Not only did the SLA suspend or revoke liquor licenses to establishments that catered to homosexuals, but from the 1930s onward, SLA undercover investigators also visited and revisited establishments to compile a record of same-sex dancing, kissing, and solicitation, including solicitation of undercover agents.³⁶⁶ With fewer investigators, New Jersey's Division of Alcoholic Beverage Control more episodically disciplined homosexual establishments pursuant to its Rule Four, adopted in 1934, which provided that no licensee can allow in the premises "any known criminals, gangsters, racketeers,

362. *See id.*

363. *E.g.*, Act effective May 27, 1935, ch. 16774, § 1, 1935 Fla. Laws 21, 22 (current version at FLA. STAT. § 561.29 (1995 & Supp. 1996)) (license can be revoked for "permitting disorderly conduct"); Texas Liquor Control Act, ch. 467, § 12(e), 1935 Tex. Gen. Laws 1795, 1801 (current version at TEX. ALCO. BEV. CODE ANN. § 61.71(a)(11) (West 1995)) (revocation if licensee allows conduct that is "lewd, immoral or offensive to public decency" or if licensee is convicted of a felony); Alcoholic Beverage Control Act, ch. 94, § 25(a), 1934 Va. Acts 100, 114 (current version at VA. CODE ANN. § 4.1-225(1) (Michie 1996)) (license can be revoked for inappropriate behavior by owner or on premises).

364. N.Y. ALCO. BEV. CONT. LAW § 106(6) (McKinney 1934).

365. N.Y. PENAL LAW § 722(8) (McKinney 1952) (amended 1965).

366. *See* GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKEUP OF THE GAY MALE WORLD, 1890-1940*, at 331-51 (1994).

pick-pockets, swindlers, confidence men, prostitutes, female impersonators, or other persons of ill repute."³⁶⁷

Other states and municipalities announced policies of suppressing gay bars after World War II. The prevailing policy was like New Jersey's Rule Four: bars where homosexuals and gender benders congregated were in peril of losing their liquor licenses. In 1948, the Michigan Liquor Control Commission issued Administrative Rule 436-3, which conditioned liquor licenses to bars, taverns, and cocktail lounges upon their refusing to serve liquor to homosexuals.³⁶⁸ Virginia amended its liquor code in 1956 to permit license suspension of bars that become "a meeting place or rendezvous for users of narcotics, drunks, homosexuals, prostitutes, pimps, panderers, gamblers, and habitual law violators."³⁶⁹ As amended in 1949, Texas's liquor control act prohibited "solicitations of persons for immoral or sexual purposes or relations."³⁷⁰ There was even similar regulation at the local level. In 1954, Miami adopted an ordinance making it unlawful for a licensed establishment to employ, serve, or allow to congregate "homosexuals, lesbians, or perverts."³⁷¹

The most ambitious regulatory effort existed in California. In 1934, California adopted its alcoholic beverage control (ABC) law, which made it a misdemeanor for a licensed premise to be a "disorderly house" or a place "in which people abide or to which resort for purposes which are injurious to the public morals, health, convenience, or safety."³⁷² Such a misdemeanor could also justify the ABC Department's revocation of the premises' liquor license,³⁷³ as would any finding that "the continuance of a license would be contrary to public welfare and morals."³⁷⁴ Following the standard enforcement techniques, these general "morals" rules were applied to close gay bars, often for no reason other than serving drinks to a homosexual clientele in the presence of undercover ABC agents. Pearl Kershaw,

367. *One Eleven Wines & Liquors, Inc. v. Division of Alcoholic Beverage Control*, 235 A.2d 12, 14 (N.J. 1967) (quoting N.J. Alco. Bev. Cont. Div. R. 4); *see also id.* (discussing *In re M. Potter, Inc.*, N.J. A.B.C. Bulletin 474, Item 1 (Alco. Bev. Cont. Comm'r Aug. 7, 1941) (suspending liquor license because "effeminate" men danced and kissed one another on the premises)).

368. *See BÉRUBÉ, supra* note 20, at 356 n.31.

369. Act of March 30, 1956, ch. 521, § 1, 1956 Va. Acts 749, 749 (current version at VA. CODE ANN. § 4.1-225(1)(h) (Michie 1996)).

370. Act effective Oct. 4, 1949, ch. 543, § 1, 1949 Tex. Gen. Laws 1011, 1011 (current version at TEX. ALCO. BEV. CODE ANN. § 104.01(7) (West 1995)). The Texas law also prohibited the premises from "[p]ermitting entertainment, performances, shows, or acts that are lewd or vulgar." *Id.* (current version at TEX. ALCO. BEV. CODE ANN. § 104.01(6) (West 1995)).

371. MIAMI, FLA., CODE § 51-35 (1954), *reprinted infra* Appendix 5.

372. Alcoholic Beverage Control Act, ch. 330, § 58, 1935 Cal. Stat. 1123 (current version at CAL. BUS. & PROF. CODE § 25601 (West 1996)).

373. *See id.* § 40 (current version at CAL. BUS. & PROF. CODE § 24200(d) (West 1996)).

374. *Id.* (current version at CAL. BUS. & PROF. CODE § 24200(a) (West 1996)).

to take one celebrated example, ran a bar in Oakland that catered to a mixed clientele.³⁷⁵ Two undercover Oakland police officers and seven undercover ABC investigators visited her bar on fourteen different occasions in April, May, and November 1955.³⁷⁶ They reported dirty dancing by female-female and male-male couples, fondling and caressing by male-female as well as same-sex couples, and the display of marriage rings by a male couple.³⁷⁷ One undercover investigator reported that a man rubbed his buttocks and loins.³⁷⁸ Based upon this sharp-eyed police testimony, the ABC Department revoked Kershaw's liquor license.³⁷⁹

The most celebrated investigations involved the Black Cat Bar, near North Beach in the San Francisco Bay area.³⁸⁰ Allen Ginsberg described the Black Cat as "maybe the greatest gay bar in America Everybody went there, heterosexual and homosexual. It was lit up, there was a honky-tonk piano; it was enormous. All the gay screaming queens would come, the heterosexual gray flannel suit types, longshoremen. All the poets went there."³⁸¹ Other observers credited its unique atmosphere to the performances by José Sarria, an over-the-top gay waiter who regaled Sunday afternoon crowds with his campy rendition of the opera *Carmen*.³⁸² Sol Stoumen, the owner of the bar, spent most of his adult life and much of the bar's profits fighting the ABC Department in court. His first big license revocation case grew out of an undercover investigation in 1949, which, not surprisingly, yielded evidence that the bar was a homosexual hangout. After the courts overturned the revocation for not complying with statutory criteria, the California Legislature in 1955 amended the ABC law to require license revocation

[w]here the portion of the premises of the licensee upon which the activities permitted by the license are conducted are a resort for illegal possessors or users of narcotics, prostitutes, pimps, panderers, or sexual perverts. In addition to any other legally competent evidence, the character of the premises may be proved by the general reputation of the premises in a community as a resort for illegal

375. See *Kershaw v. Department of Alcohol Beverage Control*, 318 P.2d 494, 496 (Cal. Dist. Ct. App. 1957).

376. See *id.*

377. See *id.*

378. See *id.*

379. See *id.* at 498.

380. See *Stoumen v. Reilly*, 234 P.2d 969 (Cal. 1951) (en banc) (holding that evidence was insufficient to support revocation of the license); D'EMILIO, *supra* note 20, at 186-88.

381. ALLEN GINSBERG, *GAY SUNSHINE INTERVIEW WITH ALLEN YOUNG* 33 (Allen Young & Karla Jay eds., 1974); see also D'EMILIO, *supra* note 20, at 186-188; HENRY EVANS, *BOHEMIAN SAN FRANCISCO* 16 (1955) (generally describing the Black Cat as a formerly good drinking establishment gone "to hell" because "the new owner encouraged the fruit[s]" to patronize it).

382. See D'EMILIO, *supra* note 20, at 187-88.

possessors or users of narcotics, prostitutes, pimps, panderers, or sexual perverts.³⁸³

This statute codified regulatory policies followed in New York and New Jersey before World War II and in other jurisdictions after the War. With extensive evidence of males kissing and caressing other males and of lewd propositions made by patrons to undercover investigators, the Department again revoked the Black Cat's license in 1957.

The 1955 law served as the most explicit legal notation for a nationwide war against homosexual bars. In 1954, Miami began enforcing an ordinance making it

unlawful for an owner, manager, operator or employee of a business licensed to sell intoxicating beverages to knowingly employ in such business a homosexual person, lesbian or pervert as the same are commonly accepted and understood. It shall likewise be unlawful for an owner, operator, manager or employee of a business licensed to sell intoxicating beverages to knowingly sell to, serve to or allow consumption of alcoholic beverages by a homosexual person, lesbian or pervert, as the same are commonly accepted and understood, or to knowingly allow two or more persons who are homosexuals, lesbians or perverts to congregate or remain in his place of business.³⁸⁴

Miami claimed the ordinance to be justified "to prevent the congregation at liquor establishments of persons likely to prey upon the public by attempting to recruit other persons for acts which have been declared illegal."³⁸⁵ Through police harassment as well as liquor board pressure, all of the Miami and Miami Beach lesbian and gay bars went out of business in the late 1950s. Similarly, the municipal police, county sheriff, and state liquor regulators worked to close many of the Tampa bars, especially the lesbian bars, in the middle of the decade.

Like Florida and California, other jurisdictions became more aggressive in policing gay bars in the 1950s and early 1960s. New Jersey's ABC Division stepped up its enforcement activities and proceeded under Rule Five, as amended in 1950, to require licensees to police their premises against "any lewdness, immoral activity, or foul, filthy or obscene language or conduct, or any brawl, act of violence, disturbance, or unnecessary noise."³⁸⁶ Officials invoked Rule Five against licensees who allowed homosexuals to congregate in

383. Act effective Sept. 7, 1955, ch. 1217, § 1, 1955 Cal. Stat. 2230, 2230 (repealed 1963).

384. MIAMI, FLA., CODE § 51-35 (1954), reprinted *infra* Appendix 5.

385. *Inman v. City of Miami*, 197 So. 2d 50, 52 (Fla. 3rd DCA 1967).

386. *One Eleven Wines & Liquors, Inc. v. Division of Alcoholic Beverage Control*, 235 A.2d 12, 14 (N.J. 1967) (quoting N.J. Alco. Bev. Cont. Div. R. 5).

their establishments, while the Division disciplined them because the assembly of homosexuals in any public space constituted a "threat to the safety and morals of the public."³⁸⁷

Liquor regulators all over the country followed this policy of closing down bars simply because they were "havens for deviates," as the New Jersey ABC Division stated.³⁸⁸ This regulatory activism created an extortion racket in which homosexual bars could remain open by bribing or paying protection money to corrupt ABC inspectors and local police.³⁸⁹ Homosexual bars also consequently had short lives, albeit with possibilities for reincarnation. In 1960, the New York SLA closed thirty gay bars in New York City, but new ones replaced them almost overnight.³⁹⁰ In 1961-1962, the California ABC Department closed twenty-four bars in San Francisco, but twenty-five remained open, including the Black Cat, still fighting for the last of its proverbial nine lives.³⁹¹

II. SURVIVAL: THE MUTUALLY PROTECTIVE CLOSET

The anti-homosexual terror in the United States from 1947 to 1961 was a chilling echo of the anti-homosexual terror in Nazi Germany from 1933 to 1945.³⁹² Consider the parallels:

- In 1933, Chancellor Adolf Hitler declared "homosexuals" to be an enemy of the state because of their threat to German youth, public morals, and national reproductivity.³⁹³ In 1950, the U.S. Congress declared "homosexuals and other sex perverts" to be an enemy of the state because of their threat to American youth, public morals, and national security. President Dwight Eisenhower made a similar declaration soon after he took office in 1953.³⁹⁴
- Also in 1933, the Prussian Minister of the Interior ordered the closing of homosexual houses and bars and banned obscene publications.³⁹⁵ American law had banned obscene publications since

387. *Id.* (quoting *In re Louise G. Mack*, N.J. A.B.C. Bulletin 1088, Item 2 (Alco. Bev. Cont. Comm'r Nov. 2, 1955)).

388. *Id.* (quoting *In re Polka Club, Inc.*, N.J. A.B.C. Bulletin 1045, Item 6 (Alco. Bev. Cont. Comm'r Dec. 27, 1954)).

389. See, e.g., KENNEDY & DAVIS, *supra* note 361, at 74-75 (noting there were virtually no raids of the Buffalo lesbian bars of the 1950s because "[p]olice payoffs seemed to have been an institutionalized aspect of Buffalo vice").

390. See Hall Call, *Why Perpetuate This Barbarism?*, THE MATTACHINE REVIEW, June 1960, at 14.

391. See SUSAN STRYKER & JIM VAN BUSKIRK, GAY BY THE BAY: A HISTORY OF QUEER CULTURE IN THE SAN FRANCISCO BAY AREA 31 (1996).

392. See generally HIDDEN HOLOCAUST? GAY AND LESBIAN PERSECUTION IN GERMANY 1933-45 (Gunter Grau ed. & Patrick Camiller trans., Fitzroy Dearborn 1995); RICHARD PLANT, THE PINK TRIANGLE: THE NAZI WAR AGAINST HOMOSEXUALS (1986).

393. See generally PLANT *supra* note 392, at 1.

394. See *supra* note 226 and accompanying text.

395. See HIDDEN HOLOCAUST, *supra* note 392, at 27-31.

the nineteenth century, a ban readily applied to homoerotic publications; most of the states prohibited bars where homosexuals congregated once the states started regulating liquor licenses after the repeal of Prohibition in 1933.³⁹⁶

- In 1934, the Prussian Minister of the Interior directed the preventive detention of habitual sex criminals convicted of molesting children.³⁹⁷ In 1948, following the lead of Illinois and California, and anticipating laws in other large states, Congress directed the preventive detention of sexual psychopaths in the nation's capital, including people not even charged with a crime. Other states, including Florida, followed the more lenient Nazi policy of indefinite detention only for people convicted of sex offenses.³⁹⁸
- In 1935, German expanded its sodomy law to make it a crime for a man to commit any kind of "sex offense" with another man, including mutual masturbation and fondling, not simply oral and anal sex;³⁹⁹ the new law introduced higher penalties for same-sex intimacy with a minor.⁴⁰⁰ Sodomy laws did not include women.⁴⁰¹ In 1953, Congress expanded the District's public indecency law to include private fondling and solicitation.⁴⁰² Similar developments occurred at the state level. Virtually all sodomy laws applied to women.
- In 1936, Heinrich Himmler's secret directive on combating homosexuality established a police bureau to "ensure uniform guidelines for central registration" of homosexual offenses.⁴⁰³ In 1951, California adopted a similar registration requirement, and other states followed. National registration of "known" homosexuals came close to congressional adoption in 1951 and 1952.⁴⁰⁴
- In 1936, the German Criminal Police established special units for detecting and flushing out homosexuals. By the late 1930s, homosexuals tended to be arrested in groups, as a result of raids.⁴⁰⁵ The total number of prosecutions rose after 1936, and sentences of those convicted tended to be longer.⁴⁰⁶ Most American cities established special vice squads for detecting and flushing out prostitutes and homosexuals; by the 1950s, homosexuals

396. See *supra* Part I.C.2-3.

397. See HIDDEN HOLOCAUST, *supra* note 392, at 36-37.

398. See *supra* Part I.A.1.

399. HIDDEN HOLOCAUST, *supra* note 392, at 64-67.

400. See *id.*

401. See *id.* at 64-67, 71-80.

402. See *supra* notes 60-61 and accompanying text.

403. HIDDEN HOLOCAUST, *supra* note 392, at 88-91.

404. See *supra* note 59 and accompanying text.

405. See HIDDEN HOLOCAUST, *supra* note 392, at 88, 132-33.

406. See *id.* at 131-32, 151-60.

tended to be arrested in groups as a result of raids. The total number of prosecutions rose after 1950, and the sentences of those convicted tended to be longer.⁴⁰⁷

- In 1936, the Reich Office for the Combating of Homosexuality and Abortion began acting as a clearinghouse for homosexual files.⁴⁰⁸ In the 1940s, the FBI informally collected information on homosexuals, and after 1950, it did so systematically. Like the Reich Office, the FBI shared the information with other enforcement agencies and with the Civil Service and even private employers.⁴⁰⁹
- In 1937-1938, the Prussian Minister of the Interior decreed loitering in specified places for sexual contact to be illegal, and decoy police officers enforced this and other preventive detention measures.⁴¹⁰ The use of vagrancy/loitering laws and decoy cops to terrorize homosexuals had been routine in New York and California since the 1920s and became routine in the District of Columbia, Philadelphia, Miami, Baltimore, and other cities after 1946.⁴¹¹
- In 1942-1944, the Wehrmacht High Command and the Luftwaffe Medical Corps developed guidelines for the special handling of homosexuality in the armed forces. The regulations sharply distinguished between offenders engaging in homosexuality because of "predisposition," who were expelled, and those "who basically have healthy sexual feelings" and were therefore allowed to serve in the armed forces.⁴¹² In 1942-1944, the United States Defense Department developed similar guidelines; after 1946, the American guidelines were more exclusionary than those of the Wehrmacht and Luftwaffe.⁴¹³
- Beginning in 1937, the Reich sentenced a fraction of its homosexual offenders to concentration camps, where they were subjected to medical experiments and treatments, primarily castration.⁴¹⁴ Beginning in 1935, but not in earnest until 1948, American jurisdictions sentenced a fraction of their homosexual offenders to hospitals or special prison wards, where they were subjected to medical experiments and treatments, primarily electrical shock and injections of hormones and drugs.⁴¹⁵

407. See *supra* Part I.A.2.

408. See HIDDEN HOLOCAUST, *supra* note 392, at 88-91, 109-10.

409. See *supra* notes 208-10, 231-35 and accompanying text.

410. See HIDDEN HOLOCAUST, *supra* note 392, at 138-150. However, Heinrich Himmler did not approve of police officer entrapment of homosexuals. See *id.* at 150.

411. See *supra* Part I.A.2.

412. HIDDEN HOLOCAUST, *supra* note 392, at 166-67.

413. See *supra* Part I.B.1.

414. See HIDDEN HOLOCAUST, *supra* note 392, at 264-65, 272-92.

415. See generally KATZ, *supra* note 50.

The main substantive difference between Nazi law and American law was that the Nazis imposed harsher penalties for homosexuality: frequently death by decree or by service in concentration camps.⁴¹⁶ Otherwise, the regulatory regimes appear much the same on paper. Indeed, the Nazi regime sometimes appears more lenient.

Discovering so many points of substantive similarity between Nazi law and U.S. law shocked me. In retrospect, the regimes seem distinct mainly because the anti-homosexual terror in America failed to destroy the homosexual subculture, although it did succeed at destroying many individual lives. On the other hand, the anti-homosexual Nazis eradicated the thriving German homosexual subculture.

The Kinsey reports on male and female sexuality revealed that laws prohibiting homosexual activity were honored only in the breach.⁴¹⁷ For every homosexual arrest, there were tens of thousands of unarrested homosexual acts. State study commissions reported that sexual psychopath laws received erratic, or nonexistent, enforcement.⁴¹⁸ The witch hunts expelling gays from military and civil service positions were relatively more effective, but only for brief periods of time. The large majority of homosexuals were able to retain their jobs in either the military or civilian service.⁴¹⁹ Lesbian and gay bars dropped like flies in the face of ABC or police harassment, but like the mythical Hydra, every bar that closed was replaced by two more. Notwithstanding censors, homosexual literature flourished after World War II like wildflowers in Tuscany, yielding some truly distinguished authors (Tennessee Williams, Carson McCullers, and William Inge) and an explosion of lesbian pulp romances that swamped the country and made authors like Ann Bannon famous.⁴²⁰

Why did the American terror fail? The anti-homosexual campaign was vulnerable on pragmatic grounds, for it would have been grossly

416. See HIDDEN HOLOCAUST, *supra* note 392, at 192-99, 264-92.

417. See ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 659-66 (1948); ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE 484-87 (1953).

418. See TAPPAN, *supra* note 41, at 34-35 (discussing failure of states to enforce laws or to enforce laws infrequently). Tappan found the laws of Illinois, Massachusetts, Michigan, New Hampshire, Washington, and Wisconsin substantially "innovative." Even in California, the District, and New Jersey, where the laws yielded double-digit cases each year, observers reported the laws "ineffectual" and "inadequate." *Id.*

419. See CRITTENDEN REPORT, *supra* note 187, at 4. The Crittenden Report found that there was "some indication that the homosexuals disclosed [in military investigations] represents only a very small proportion of homosexuals in the Navy." *Id.* The report summarized two studies of homosexual men who served in the armed forces: in one study, 45 of 52 men served without incident and only two were discharged for homosexuality; five were discharged for other reasons. In the other study, 118 of 132 men served without incident and only four were discharged because of homosexuality; 10 were discharged for other reasons. See *id.*; see also WILLIAMS & WEINBERG, *supra* note 242, at 46-53.

420. See FOSTER, *supra* note 339, at 25; Gene Damon, *The Lesbian Paperback*, TANGENTS, June, 1966, at 4-7.

expensive to carry out properly, and it rested upon questionable and sometimes unfounded ideas. The sexual psychopath laws were neglected in part because states were not willing to spend big money on psychiatric treatment for sex offenders. Also, the terror generated its own opposition. The hysteria and fear upon which the terror built were not attractive in the long term to sensible Americans. More important, the campaign's obsessive focus on sexual orientation minorities generated a strong sense of shared identity among gay people, as well as anger at their persecution and a determination by few to do something about it. Ironically, the American anti-homosexual terror helped create a homosexual rights movement. On the other hand, the Nazis successfully crushed the German homophile movement that had flourished before 1933. This movement came close to repealing Germany's sodomy law in 1929. Why did the American anti-homosexual movement fail, while the Nazi-driven German version succeeded?

In my view, two additional factors reinforced the pragmatic problems that doomed the anti-homosexual campaign in the United States. One was America's constitutional structure, which is decentralized and libertarian. Erasing a minority group is unusually difficult in the United States, for it requires a sustained level of institutional cooperation: for a national campaign, the President and both houses of Congress must all enact laws, which then must be upheld and vigorously enforced in federal courts and agencies. States must also agree to enforce the laws and to legislate in their own jurisdictions. Unless there is strong consensus about a goal, such as the desire to win World War II, the decentralized American system tends to act slowly and run out of steam. A totalitarian state can more easily accomplish such erasure than can the lumbering and deliberative United States. Also, specific constitutional and legal traditions in this country afford several avenues of escape for Americans faced with a substantial penalty, such as plea bargaining, acquittal by a jury, or leniency imposed by a judge. Decentralization and libertarian tradition also offered critics of the terror many different avenues of affirmative resistance, such as lobbying legislatures, pressuring administrators, persuading judges or juries, or mobilizing public opinion.

These structural features of American government would have been of less significance had the anti-homosexual terror not been criticized by heterosexuals as well as homophiles. In researching this Article, I was most surprised to discover that the 1950s witnessed a shift toward greater tolerance in American intellectual and scientific discourse about homosexuality. Expert medical opinion all but abandoned the "scientific," as opposed to moralistic, premises of state regulation, i.e., that homosexuals are psychopaths, recruit young people, and are socially dangerous. Dr. Alfred Kinsey and Dr. Evelyn Hooker are the experts usually associated with the rejection of these

stereotypes, but the bulk of the medical establishment supported their findings and views.⁴²¹ The doctors who continued to advance theories of sick homosexuals (Dr. Edmund Bergler and Dr. Irwin Bieber) received disproportionate press attention, but the center of expert gravity shifted toward the Kinsey-Hooker position in the 1950s. The shift was not limited to medical experts. The more discourse there was about homosexuality, paradoxically, the more normalized it became. As the state "outed" (to use the recent term) thousands of homosexuals, more Americans realized that they knew somebody who was gay, and that realization had subtle effects on attitudes. That shift in attitudes did not mean that tolerant Americans felt homosexuality was "good." It only meant that homosexuality came to be less demonized. A mutually protective closet supplanted the straight-threatening closet for these Americans.

The foregoing features—the practical problems with anti-homosexual programs, their intellectual vulnerability, and the usefulness of constitutional decentralization and the rule of law—decisively affected the organization and strategies of homosexuals seeking to survive the terror. All of these features have a libertarian element, protecting the individual against state invasion of a socially defined private realm of freedom. The privacy idea, therefore, became a common ground for homosexuals and moderate homophobes (i.e., people who were revolted by homosexuality but were relatively tolerant). The privacy idea also informs the mutually protective closet: homosexuals reside discreetly in the closet, and heterosexuals do not open the door.

For the most part, homophile leaders and their groups (the Mattachine Society, the Daughters of Bilitis) seized upon the privacy idea. Specifically, the homophile leaders of the 1950s emphasized their legal privacy rights and de-emphasized their legal equality rights. Thus, their embrace of the protective closet marginalized more radical approaches. Although former Communist Harry Hay was the founder and early guiding force of the Mattachine Society, the homophile movement soon rejected his Marxist framework of militant resistance. Also marginalized was the much tamer minority-rights approach of Donald Webster Cory. In *The Homosexual in America*, Cory argued—remarkably so in 1951—that homosexuals were a minority group worthy of equal rights like those afforded ethnic and racial minorities.⁴²² The homophile movement did not necessarily disagree, but instead emphasized assimilative strategies for

421. See *supra* note 41 (noting California (Dr. Karl Bowman), Illinois (Dr. Charles Bowman), New Jersey (Professor Paul Tappan), and New York (Dr. Bernard Glueck) study commission experts supporting Kinsey and Hooker theories).

422. See CORY, *supra* note 208, at 300.

homosexuals and appealed to moderate homophobes for grudging tolerance on the ground that the homosexual, as opposed to the rapist and child molester, did no one any harm.

Although the homophile movement was later criticized for its assimilative embrace of the protective closet, this might have been the most practical course of action in an intensely anti-homosexual society. Judges, the most important audience for homophile resistance, were as anti-homosexual as any other group in the 1950s. However, judges have traditionally been open to libertarian arguments and, particularly during this period, attracted to "neutral" rights-based arguments. In the 1950s and early 1960s, the Warren Court expanded procedural rights as a way of impeding racist and anti-Communist witch hunts. The rights developed in the race and political subversion cases were applicable to anti-homosexual cases so long as judges were modestly tolerant or neutral, traits that many possessed.

The interplay between homosexuals' reliance on privacy as the primary defense against the anti-homosexual terror and moderate homophobes' willingness to create a space for the nonpublic homosexual was important to the creation of the closet as a concept distinct from the double life. Like the double life, the closet involved secrecy. Unlike the double life, the closet involved secrecy about a matter Americans were increasingly interested in discussing and homosexuals were increasingly weary of hiding. The double-edged nature of homosexuality rendered the closet an attractive compromise during the 1950s, and it contributed to the short-term survival of homosexual subcultures. On the other hand, the privacy of the mutually protective closet was a problematic strategy for long-term survival. The dispersion of power in our country offered as many opportunities for official harassment by extreme homophobes as it offered avenues of escape from incarceration for homosexuals. While the anti-homosexual police officer can later be kept in check by the closet-respecting judge or prosecutor, the judge or prosecutor is limited in her or his ability to stop the police officer from engaging in harassment in the first place.

In Los Angeles, to take the best documented example, the police were eager to arrest gay men, even though prosecutors were willing to plea bargain felonies into misdemeanors and lewd vagrancy charges (for which registration was required and teacher's certificates and professional licenses could be revoked) into public indecency charges (with few if any collateral consequences).⁴²³ From the

423. See Gallo et al., *supra* note 65, at 783 (noting that less than one percent of those charged with sodomy and sex perversion felonies ultimately received felony dispositions or sentences).

homophile point of view, it was good that gay people did not go to jail, but unacceptable that they were arrested in the first place. More important, the libertarian presumption was malleable, and its malleability undermined the possibility of the closet's security as a hiding place.

A. *Substantive Privacy (Criminal and Military)*

Chapter four of John Stuart Mill's *On Liberty* is the inspiration of a substantive understanding of legal privacy: neither the community nor the state has any business telling a person how to make *private* decisions in his or her life unless the person's actions harm others or the community at large through *public* action. Under Mill's libertarian philosophy, the community cannot forbid you to do something simply because it offends other people. This conception of substantive privacy served as a baseline for criticizing the highly intrusive state campaign against homosexuals because it provided arguments for toleration that did not concede that homosexuality was in any way good or benign. This idea picked up a lot of support in the 1950s, but its application by a fearful judiciary and legal intelligentsia diluted the conception of substantive privacy to the point of absurdity.

1. *Legislative Policy: Refocusing State Criminal Law*

Substantive privacy had its most powerful articulation in criminal code reform commissions. Following Paul Tappan's suggestions in New Jersey's report on sex offenders, the Illinois Commission on Sex Offenders, chaired by Professor Francis Allen of Northwestern University Law School and advised by Dr. Charles Bowman, constructed its 1953 report around the "distinction . . . between sexual deviates whose conduct in the community offends morals (e.g., homosexuals, exhibitionists), and dangerous, aggressive offenders whose behavior is a community threat (e.g., rapists, child molesters)."⁴²⁴ Like Tappan and the New Jersey Commission, the Illinois Commission urged regulatory action to focus on (1) "repetitive compulsive acts" (peeping toms), (2) "forced relations," and (3) relations involving an adult and a minor.⁴²⁵ The implication of both reports, as well as those in California and New York, was that consensual same-sex intimacy in private places was essentially not the concern of the law.⁴²⁶

424. ILL. COMM'N ON SEX OFFENDERS, *supra* note 41, at 10-11.

425. *Id.* at 8-9.

426. See generally NEW JERSEY COMM'N ON THE HABITUAL SEX OFFENDER, *supra* note 41; ILL. COMM'N ON SEX OFFENDERS, *supra* note 41; CAL. DEPT OF MENTAL HYGIENE, *supra* note 41; N.Y. RESEARCH PROJECT, *supra* note 41.

Following the Illinois and New Jersey sex offender commissions, the American Law Institute (ALI) narrowly voted in May 1955 to decriminalize consensual sodomy in a tentative draft of its proposed Model Penal Code.⁴²⁷ The ALI reasoned that "[n]o harm to the secular interests of the community is involved in atypical [sic] sex practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities."⁴²⁸ The drafters explicitly invoked Mill's notion of the "protection to which every individual is entitled against state interference in his personal affairs when he is not hurting others."⁴²⁹ Criminalizing such practices sapped valuable police resources, fueled blackmail rings, and individual privacy through government interference.

Two years later, the United Kingdom's Wolfenden Report repeatedly expressed its members' disgust with homosexuality, yet the Report recommended that "homosexual behavior between consenting adults in private should no longer be a criminal offense."⁴³⁰ The philosophy of the report was Millian from the outset:

What acts ought to be punished by the State? . . . In this field, its function, as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence.

It is not, in our view, the function of law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior, further than is necessary to carry out the purposes we have outlined. . . .⁴³¹

Both the Wolfenden Report and the Model Penal Code recommended that homosexual solicitation, sex with minors—defined by

427. See MODEL PENAL CODE § 207.5 (Tentative Draft No. 4, 1955) (decriminalizing fornication, adultery, and other sexual crimes not involving violence or children); see also Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963). Judge John Parker of the Fourth Circuit, the jurist whose nomination to the Supreme Court in 1930 was defeated because of his anti-civil rights and anti-union views, vigorously opposed the move. The critical voice in favor of the proposal was Judge Learned Hand of the Second Circuit, the most distinguished jurist in the nation. See generally GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994).

428. MODEL PENAL CODE § 207.5 commentary at 277-78 (Tentative Draft No. 4, 1955).

429. *Id.* at 278.; see also *id.* § 207.1 commentary at 207.

The Code does not attempt to use the power of the state to enforce purely moral or religious standards. . . . Such matters are best left to religious, educational and other social influences. . . . [I]t must be recognized, as a practical matter, that in a heterogeneous community such as ours, different individuals and groups have widely divergent views of the seriousness of various moral derelictions.

430. COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, UNITED KINGDOM, *THE WOLFENDEN REPORT* 48 (Am. ed. 1963).

431. *Id.* at 23-24.

the Wolfenden Report as people under the age of twenty-one—and any kind of public indecency should remain criminal.⁴³² In the positivist tradition separating law and morals, these reformers were decidedly anti-homosexual but willing to set aside a private space—the mutually protective closet—where homosexuals could exist without state harassment.⁴³³

These suggestions stimulated a robust debate but virtually no formal action in the 1950s. New York came closest to codifying these suggestions when, in 1950, it followed the suggestions of its own study commission and reduced consensual sodomy to a misdemeanor.⁴³⁴ In 1961, Illinois adopted the Model Penal Code, including its allowance of consensual sodomy,⁴³⁵ but only after its committee of prestigious lawyers bought off opposition from the Roman Catholic Church by narrowing the Code's defenses to abortion.⁴³⁶ The lack of receptivity to the Model Penal Code demonstrated how slowly would be legislative progress toward the mutually protective closet. Traditionalists who viewed homosexuals as predatory child molesters, subversives, and psychopaths incapable of controlling their emotions and sexual urges would not be persuaded by such privacy arguments, for in their minds homosexuality always ran the risk of public nuisance. While such thinking was substantially discredited among intellectuals in 1961, it retained a hold on the larger culture. Even its diminished constituency was sufficient to defeat efforts to change the law; under our system, it is much easier to resist changes in the law you oppose than to obtain the changes in the law you desire.

What I consider to be a representative glimpse into the privacy debate among policymakers is afforded by the minutes of the advisory committee appointed to draft a revision in Florida's sex laws.⁴³⁷ The advisory committee immediately divided into two groups, a group consisting of academics and psychiatrists, who favored the Model Penal Code approach just adopted in Illinois, and a group consisting of law enforcement officers and judges, who opposed any Illinois-style deregulation. Dr. Walter Stokes, the main speaker for

432. See *id.* at 48-55; MODEL PENAL CODE § 207.4 commentary at 277-81 (Tentative Draft No. 4, 1955).

433. See H.L.A. HART, LAW, LIBERTY, AND MORALITY (1963) (responding to Patrick Devlin's *The Enforcement of Morals* (1959), which responded to the Wolfenden Report).

434. See Act of Apr. 11, 1950, ch. 525, § 15, 1950 N.Y. Laws 1271, 1278-79 (current version at N.Y. PENAL LAW § 130.38 (McKinney 1996)).

435. See Act of July 28, 1961, § 35-1, 1961 Ill. Laws 1983, 2044 (repealed 1984).

436. See Letter from Dr. Charles Bowman, Professor of Law, University of Illinois, to [name blackened out] (June 15, 1964) (available at Fla. Dep't of State, Div. of Archives, ser. 1486, carton 2, Tallahassee, Fla.).

437. The account that follows is taken from Minutes of the Advisory Committee to the Florida Legislative Investigation Committee, June 29-30, 1964 (available at Fla. Dep't of State, Div. of Archives, ser. 1486, carton 1, folder 15, Tallahassee, Fla.), as well as follow-up correspondence. Appendix 6 to this Article reproduces these minutes.

the former group, argued that "the homosexual who engages in homosexual activities exclusively with other homosexuals in private presents no harm or danger to society," and others on his side pointed to the disadvantages of retaining laws against consensual sex, which were enforced arbitrarily and opened law-abiding citizens to blackmail.⁴³⁸ Judge John Rudd, the main speaker for the other side, objected that "to ignore consenting adults in private would certainly be to condone their actions and before long the problem would be out of control." He pointed to the federal government's exclusion of homosexuals from any position as evidence that homosexuals are "security risks" and "defectors" who could not be trusted.⁴³⁹ Law enforcement officer Duane Barker was the most adamant opponent of deregulation. "I think that if we take adult, consenting homosexual relationships out of the criminal category, then we're going to increase our homosexual population in the State of Florida to the point where no child will be safe anywhere, anytime."⁴⁴⁰ The advisory committee could agree on no proposal for deregulating consensual sodomy in Florida.

Moreover, the moderates favoring the Model Penal Code were encoding an odd and restrictive understanding of privacy and the closet. The Model Penal Code criminalized solicitation of "deviate sexual relations" (but not "nondeviate" sexual relations) if the solicitor loitered in a public place.⁴⁴¹ Thus, one could have consensual homosexual intercourse in private, but only as long as the partner materialized from a nonpublic place. Unless the solicitation were a true public nuisance, which was not a requirement of the Code, it is difficult to see how the solicitation was materially less private than the consummation.⁴⁴² To procure enactment of the Code in Illinois, the sponsors were willing to prohibit any kind of public displays of affection between people of the same sex.

438. *Id.* at 8; see also *id.* at 9 (Dr. Kapchan: "ours is supposed to be a free society, and he felt it to be immoral to invade the privacy of human beings if they are in no way encroaching on the rights of another human being"); *id.* (Dr. Davis arguing there is no public purpose to outlawing "private" conduct, as opposed to "public indecency"); Letter from Dr. Jack Kapchan, Assoc. Professor, University of Miami, to John Evans, Staff Director, Fla. Legis. Investigation Comm., July 7, 1964 (available at the Fla. Dep't of State, Div. of Archives, ser. 1486, carton 2, folder 3, Tallahassee, Fla.) (systematic statement of the medical-social science perspective favoring deregulation of consensual private intimacy but agreeing to regulate "homosexual behavior as deviant" so long as heterosexual fornication is deregulated).

439. Advisory Committee Minutes, *supra* note 437, at 7, 8 (paraphrase of Judge Rudd's remarks).

440. Letter from J. Duane Barker to John Evans, Staff Director, Fla. Legis. Investigation Comm., July 13, 1964; see also Advisory Committee Minutes, *supra* note 437, at 8 (same position in meeting, that homosexuals will "go out looking for children," to recruit them).

441. MODEL PENAL CODE § 207.5(4) (Tentative Draft No. 4, 1955).

442. See *id.* Because of the possibility that sexual intercourse can transmit venereal disease, there would seem to be at least as much public risk from the "private" conduct as from the "public" conduct.

I should hypothesize that the discourse of privacy would have affected the enforcement of sodomy and other laws used to detain homosexuals. Judge Lamar Winegart, Jr., observed during the 1964 Florida advisory committee discussions that "as a practical matter, if a couple engaged in sexual relations are actually in the privacy of their room, then they never come to the attention of law enforcement officers anyway."⁴⁴³ This hypothesis receives substantial support from the data. Sodomy arrest information for New York City and Los Angeles support the hypothesis: by 1961, homosexuals arrested for sodomy and sex perversion in those cities were usually the result of a citizen complaint objecting to public sex or sex with a minor, or the result of police observations of quasi-public (toilet, park) intercourse.⁴⁴⁴ The data for the District in Appendix 1B do not support the hypothesis, at least insofar as they suggest the persistence of non-complainant arrests for sex with an adult into the 1960s and 1970s. This pattern may be more characteristic of southern and smaller cities. I should guess that cities in the Northeast and on the West Coast and Great Lakes followed the pattern of New York and Los Angeles.

2. *Judicial Policy: The Rule of Lenity*

A bedrock precept of Anglo-American jurisprudence, the rule of lenity posits that requisites for applying a criminal sanction must be rigorously enforced and that ambiguities in criminal laws must be resolved in favor of defendants. Homosexual defendants were typically middle-class men with resources to retain counsel and strong incentives to avoid criminal prosecutions and to overturn convictions of serious crimes. Before the homophile community started organizing in the 1950s, individual homosexuals and their attorneys fought guerrilla operations against legislative and police broadening of anti-homosexual criminal laws. These defendants had some (albeit unsystematic) success because the new laws clashed with traditional rule-of-law values, and because some judges, mainly at the trial level, were willing to enforce those values.

Even at the height of the anti-homosexual terror, judges were sometimes willing to narrow sodomy laws on the ground that they did not provide sufficient notice of illegality to sexual deviants. Oral sex, easily the most popular form of same-sex intimacy, remained incompletely regulated in states as different as New Mexico and New Jersey because of narrowing interpretations by state courts.⁴⁴⁵ In

443. Advisory Committee Minutes, *supra* note 437, at 5 (paraphrase of Judge Winegart's comment).

444. See *supra* note 67 (New York); Gallo et al., *supra* note 65, at 718 (Los Angeles).

445. See, e.g., *People v. Schmitt*, 267 N.W. 741, 741 (Mich. 1936) (holding that the state's sodomy law does not include cunnilingus); *Bennett v. Abram*, 253 P.2d 316, 316 (N.M. 1953) (holding that the sodomy law does not include oral sex); *State v. Morrison*, 96

1939, the Georgia Supreme Court interpreted its sodomy law to be inapplicable to oral sex between two women.⁴⁴⁶ The court reaffirmed this holding in 1963.⁴⁴⁷ In 1961, New York's Court of Appeals interpreted its sodomy law to criminalize only active and not passive fellatio.⁴⁴⁸

On the other hand, decisions like these were exceptional. The large majority of rule-of-lenity arguments were rejected, even when the state law only prohibited the "infamous crime against nature," because such laws had an established judicial and popular meaning. In the few cases where the rule of lenity narrowed sodomy statutes, legislatures were willing to override them, as did New York in 1962 and Georgia in 1969. Also, so many different state criminal laws were applicable to homosexual activity that the state could simply shift from a narrowly construed law to a broader one if it truly desired to harass, arrest, or prosecute a defendant. The New York Court of Appeals, for example, helpfully reminded the state that the adult fellator could be prosecuted as an aider or abetter of the minor's sodomitic crime.⁴⁴⁹

Appellate courts in the 1950s did little to narrow the application of sodomy laws. Most of the narrowing of sodomy laws came through more informal application of the rule of lenity by trial judges and prosecutors. In the District of Columbia, most sodomy prosecutions were against men who had sex with minors or forcible sex with adult women.⁴⁵⁰ Although the District is the only jurisdiction for which I have data about complaints, anecdotal evidence suggests that this was the prevailing prosecutorial policy, and one that most trial judges encouraged. Additionally, prosecutors were willing to accept misdemeanor pleas in many of those cases, at least by the early 1960s. The UCLA Study found that forty percent of the sodomy and oral copulation defendants were able to plead down to lewd vagrancy or, in the large majority of cases, public indecency.⁴⁵¹ Trial judges

A.2d 723, 724 (N.J. 1953) (stating the sodomy law does not include oral sex); see also *State v. Evans*, 245 P.2d 788, 789 (Idaho 1953) (interpreting child molestation statute to permit judge to set maximum sentence at less than the statutory life sentence); *State v. Vallery*, 34 So. 2d 329, 331 (La. 1948) (refusing to enforce law prohibiting "any immoral act" on a juvenile).

446. See *Thompson v. Aldredge*, 200 S.E. 799, 800 (Ga. 1939).

447. See *Riley v. Garrett*, 133 S.E.2d 367, 368 (Ga. 1963) (discussing male-female cunnilingus while reaffirming and applying *Thompson*). But see *Fine v. State*, 14 So. 2d 408, 410 (Fla. 1943) (applying crime against nature statute to male-female cunnilingus involving an adult and child); *State v. Townsend*, 71 A.2d 517, 518 (Me. 1950) (broadening crime against nature statute beyond "sodomy or any other bestial and unnatural copulation").

448. See *People v. Randall*, 214 N.Y.S.2d 417, 422-23 (N.Y. 1961).

449. See *id.* at 423-24.

450. See *infra* Appendix 1B.

451. See Gallo et al., *supra* note 65, at 770-75.

accepted and often insisted upon public indecency as the maximum penalty because that misdemeanor carried no further legal disabilities. A conviction of oral copulation or lewd vagrancy required registration and revocation of professional licenses, while a conviction for public indecency did not.

Because of problems of proof, sodomy laws were less popular in policing homosexuals than solicitation, vagrancy, and disorderly conduct laws targeting homosexual overtures. The rule of lenity sometimes circumscribed the usefulness of these laws, as is best exemplified by cases from Washington, D.C. and New York City. Lower court judges affirmatively resisted police and legislative efforts to criminalize homosexuals as a status group and enforced overt act requirements found in the statutes. As amended in 1923 to override narrow lower court constructions, section 722(8) of New York's penal law made it a crime when a person, "with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, . . . [f]requents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness."⁴⁵² As early as 1947, New York City magistrates complained of the "increasing tendency to employ section 722 whenever it is determined a person should be arrested,"⁴⁵³ and the magistrates in the 1950s repeatedly rejected prosecutions that did not prove intended or probable breaches of the peace and active solicitation of sodomy.

At 2:00 a.m. on March 21, 1958, Benito Feliciano approached undercover patrolman Joseph Curry at 10 St. Marks Place, directly in front of a Turkish bath known as a hangout for gay men. Placing his cupped hand on the genitals of Patrolman Curry, Feliciano offered to perform oral sex. His arrest under section 722 was overturned by the Magistrate's Court, which followed precedents requiring proof of intended or actual breach of the peace.⁴⁵⁴ Also following earlier cases that overturned disorderly conduct convictions of homosexuals, Magistrate Charles Solomon questioned whether defendant's conduct satisfied the "frequents or loiters" requirement of the disorderly conduct law.⁴⁵⁵ His opinion further noted that the district attorney had petitioned the New York Legislature to broaden the law to cover "any person who, in any public place, invites or solicits another to engage in or to participate with him in committing a crime against nature or an act of lewdness or indecency."⁴⁵⁶ The Legislature failed to enact that law, but even under this broader law some magistrates would have been reluctant to sustain convictions. In other cases,

452. N.Y. PENAL LAW § 722(8) (McKinney 1923) (amended 1965).

453. *People v. Swald*, 73 N.Y.S.2d 399, 400 (Magis. Ct. 1947).

454. *See People v. Feliciano*, 173 N.Y.S.2d 123, 124 (Magis. Ct. 1958).

455. *See id.* at 125.

456. *Id.* at 126.

magistrates required concrete entreaties rather than winks and nods to establish solicitation.⁴⁵⁷

Throughout this period, New York City's magistrates conducted a guerrilla war against broad application of New York's disorderly conduct law. As Magistrate Solomon put it, "The statute is not aimed at sex deviation as such—'degeneracy.' . . . No conviction can be justified unless the facts fit into the statute. We may not predicate guilt on the basis of personal aversion, revulsion, or detestation. Justice under law is objective and impersonal."⁴⁵⁸ Even from a homophobic perspective, it would be hard to find fault with that philosophy and the particular reasoning. The New York Court of Appeals ultimately rejected these arguments, however. In *People v. Lopez*,⁴⁵⁹ the court upheld a disorderly conduct conviction for simple homosexual solicitation.⁴⁶⁰ Three dissenting judges would have followed the lower courts in requiring a breach of the peace, as the penal statute by its plain language required.

In *People v. Hale*,⁴⁶¹ the New York Court of Appeals reversed a New York Supreme Court decision that overturned the conviction of Kenneth Hale for soliciting an undercover cop. Hale had been arrested under the state's vagrancy statute, which prohibited loitering "for the purpose of inducing, enticing or procuring another to commit lewdness, fornication, unlawful sexual intercourse or any other indecent act."⁴⁶² Against a dissenting judge's objection that the statute was aimed at loitering pimps and prostitutes, the court held that "it applies equally to loitering homosexuals."⁴⁶³ Four years later, the same court applied another subsection of the vagrancy law to cross-dressing homosexuals.⁴⁶⁴ In all these cases, the eminent New York Court of Appeals was showing no "lenity" to homosexual defendants, for it was extending broad, ambiguous statutes to criminalize harmless conduct. Inverting the rule of lenity, *Lopez* deleted an explicit statutory requirement to convict the defendant.

In the District of Columbia, Associate Judge Andrew Hood of the Municipal Court of Appeals conducted an almost single-handed campaign to narrow the application of local statutes used to prosecute homosexuals. In *Dyson v. United States*,⁴⁶⁵ the defendant was convicted of assault when he fondled the genitals of a decoy cop with

457. See *People v. McCormack*, 169 N.Y.S.2d 139, 141-42 (Ct. Spec. Sess. 1957); *People v. Burnes*, 178 N.Y.S.2d 746, 749-50 (Ct. Spec. Sess. 1958).

458. *Feliciano*, 173 N.Y.S.2d at 126.

459. 164 N.E.2d 720 (N.Y. 1959).

460. See *id.* at 721; see also *People v. Liebenenthal*, 155 N.E. 2d 871, 871-72 (N.Y. 1959).

461. 168 N.E.2d 518 (N.Y. 1960).

462. *Id.* at 519 (quoting N.Y. CRIM. PROC. LAW § 887(4)(c) (McKinney 1960)).

463. *Id.*

464. See *People v. Gillespi*, 202 N.E.2d 565, 565 (N.Y. 1964).

465. 97 A.2d 135, 136 (D.C. 1953).

whom he was engaged in casual conversation late at night.⁴⁶⁶ Analogizing the unwelcome touching of an undercover cop to rape, the court of appeals affirmed the conviction.⁴⁶⁷ Dissenting, Judge Hood interpreted the assault statute to exclude touching to which the victim consented.⁴⁶⁸ He objected to the rape analogy, because the officer's conduct welcomed rather than discouraged fondling.⁴⁶⁹ Most of all, Judge Hood objected to the witch-hunt nature of the prosecution. Dyson "was charged with assault and convicted on proof of homosexuality."⁴⁷⁰ In *McDermett v. United States*,⁴⁷¹ however, the court accepted Judge Hood's narrowing interpretation of the assault statute.⁴⁷²

The court's narrowing construction of the District's general assault statute still left the police free to prosecute the same conduct under two statutes that had been broadened in 1953. One law made it a crime to "entice" another person "for the purpose of prostitution or any other immoral or lewd purpose," and the other made it illegal "to make any lewd, obscene, or indecent sexual proposal, or to commit any other lewd, obscene, or indecent act in the District of Columbia."⁴⁷³ For reasons obscure to me, only the latter was subjected to a narrowing interpretation by the courts. Tipped off by the local probation department, Officer Arscott of the morals squad telephoned Carl Rittenour; representing himself as down and out, the officer asked if he could stay with Rittenour.⁴⁷⁴ After he followed Rittenour to the kitchen, Rittenour fondled the officer and invited him to have sex, whereupon the officer arrested Rittenour.⁴⁷⁵ On appeal, Judge Hood conceded the broad phrasing of the 1953 solicitation law, but held that it "was not designed or intended to apply to an act committed in privacy in the presence of a single and consenting person."⁴⁷⁶ Judge Hood relied on the common law's animus against criminalizing private conduct and against status crimes.

3. Military Policy: The Crittenden Reevaluation

In 1956, the Navy appointed Captain S.H. Crittenden, Jr., to chair a board to evaluate Navy policy regarding homosexuals. Captain

466. See *id.* at 136.

467. See *id.* at 138.

468. See *id.* at 138 (Hood, J., dissenting).

469. See *id.*

470. *Id.* at 139. This was in response to the prosecutor's argument: "There is good reason to prosecute these cases. All the security agencies of the United States immediately fire these people as weak security risks." *Id.* at 138-39.

471. 98 A.2d 287, 289 (D.C. 1953).

472. See *id.* at 289; see also *Guarino v. United States*, 237 F.2d 578, 581 (D.C. Cir. 1956).

473. D.C. CODE § 2701 (1953) (enticing); *id.* § 22-1112 (indecent proposal/lewd act).

474. See *Rittenour v. District of Columbia*, 163 A.2d 558, 559 (D.C. 1960).

475. See *id.*

476. *Id.*

Crittenden's report, delivered on March 15, 1957 (after the height of the witch hunting), is the most thorough snapshot of military policy in that era, for it thoroughly researched the policies in the different services and sought to understand the operation of the policies.⁴⁷⁷ The report and its appendices also reflect the importance of the privacy concept in military setting.

Like most of the state sex offender study commission reports, the Crittenden Report subjected "fallacies concerning homosexuality" to fact-based analysis.⁴⁷⁸ It found no evidence to believe that homosexuals were per se security risks (rejecting the Hoey Subcommittee findings on that point) or were unacceptable for military service.⁴⁷⁹ The Board was also remarkably well aware of shifting medical and legal opinion. It consulted leading medical experts, such as Dr. Francis Braceland, president of the American Psychiatric Association and psychiatric consultant to the Navy's Surgeon General, and Dr. Manfred Guttmacher, chief medical officer of the Baltimore Supreme Bench. The medical experts were uniformly supportive of the homosexual's privacy rights even in the military setting. The Board expressed due sympathy for these views but, in something of a volte-face, recognized "the necessity within the naval service to adhere to the general policy of non-acceptance of the homosexual offender."⁴⁸⁰

Although the Board did not reject the general policy of excluding homosexuals, it did press other ways the armed forces could accommodate the privacy idea. Reflecting the unanimous view of medical experts, the Board criticized the Navy's written policy requiring doctors to report confessions of homosexual tendencies or acts to their commanding officers. It noted that many medical officers exercised their professional discretion to withhold such information and recommended that this practice "be tacitly recognized as permissible."⁴⁸¹ Moreover, the Board was sensitive to the effect of a less than honorable discharge on the service person's job opportunities and community reputation, especially given the government-wide promulgation of the reason for discharge under the Eisenhower Administration's policies. The Board recommended that personnel separated for homosexual tendencies (Class III) be given the discharge

477. See generally CRITTENDEN REPORT, *supra* note 187.

478. CRITTENDEN REPORT, *supra* note 187, at 5-6.

479. See *id.* at 5-6, 46. While the report rejected the idea that homosexuality was a mental disease, it did accept the idea that it was a symptom of "organic brain disease" or other mental problems. *Id.* at 7. While the report found that "a homosexual is not necessarily more of a security risk, per se, than other transgressors of moral and criminal codes," it recognized that "homosexual activity, as in the case of promiscuous heterosexual activity, [raises] serious security considerations." *Id.* at 46.

480. *Id.* at 55.

481. *Id.* at 20.

otherwise warranted by the person's service record, usually honorable.⁴⁸²

The Board's most interesting discussion involved the treatment of service persons who committed a single, allegedly isolated, act of same-sex intimacy. The report recommended that the Navy follow the Army and Air Force policies of allowing personnel to remain in service if they could persuade the government that they were not "confirmed homosexuals."⁴⁸³ This "queen for a day" exception to the homosexual exclusion illustrates how the privacy idea helped create an apartheid of the closet. The homosexual in the Navy could have an active sex life because, according to the Crittenden Report, few active homosexuals were actually apprehended by the deviance gendarmerie. But within the Navy, the homosexual needed to be completely in the closet, even for the staff psychiatrist, who, perhaps, had a duty to report any confession of homosexual tendencies. However, if apprehended, the homosexual could avoid a discharge by persuading the officials that he or she was actually heterosexual.

The Crittenden Report's well-intentioned recommendations, which reflected relatively progressive views for the era, nonetheless featured the worst aspects of the mutually protective closet. The report pandered to existing social disapproval of homosexuality, insisted upon an increasing degree of psychiatric discourse, and then allowed the ostensible heterosexual the "queen for a day" escape hatch. The result: institutionalized dishonesty.

B. Procedural Privacy (Criminal)

In the 1950s, procedural privacy rights augmented whatever effect substantive privacy rights had on homosexual survival. While substantive privacy limited the state's ability to regulate personal conduct, procedural privacy required the state to follow specified procedures before it could regulate. Unlike substantive privacy, which in the 1950s was mainly a legislative concern, procedural privacy was primarily a judicial concern.

1. Due Process Protections for the Homosexual Defendant

Almost half of the assurances in the Bill of Rights involve criminal procedure: the right to be free of unreasonable searches and seizures,⁴⁸⁴ to avoid self-incrimination,⁴⁸⁵ to fair bail,⁴⁸⁶ to counsel and to

482. See *id.* at 24-26. The Board also recognized that the Navy ought to retain the power to discharge dishonorably, lest someone should attempt to invoke the homosexuality exclusion to escape mandatory military service. See *id.*

483. *Id.* app. 3 at 434.

484. See U.S. CONST. amend. IV.

485. See *id.* amend. V.

trial by jury,⁴⁸⁷ and to be free of cruel and unusual punishment.⁴⁸⁸ Most state constitutions provide similar rights, and the U.S. Supreme Court has held that some of the criminal procedure rules of the Bill of Rights are directly applicable to the states through the Due Process Clause of the Fourteenth Amendment.⁴⁸⁹ In the 1950s, the U.S. Supreme Court and the California Supreme Court vigorously elaborated upon the rights of accused criminals. This had a pervasive effect on people accused of serious homosexual offenses and probably contributed to declines in anti-homosexual vice enforcement by 1961.

Because homosexuals who had any kind of social life could be arrested at any time (the bars, parks, and tearooms were heavily policed), it was important for them to know their legal rights. The January 1954 issue of *One* contained a one-page statement of "Your Rights in Case of Arrest":

1. If an officer tries to arrest you, he should have a warrant unless a misdemeanor (minor violation) or a felony (serious offense) has been committed in his presence, or he has reasonable grounds to believe the person being arrested is guilty.

2. If he has no warrant, ask what the basis of arrest is. If it is not explained in No. 1 above, go along but under protest made before a witness if possible. **DO NOT RESIST PHYSICALLY.**

3. **GIVE NO INFORMATION.** You may, but do not have to, give your name and address. Do **NOT** talk to any policeman.

Q: "Why did you commit this crime?"

A: "I'm not guilty and I'd like to speak to my attorney, please."

Q: "How long have you been a lewd vagrant?"

A: "I'm not guilty, and I'd like to see my lawyer before making a statement."

Q: "Have you been arrested for this before?"

A: "I'm not guilty and my attorney would rather I speak thru him."

Q: "Nice day, isn't it?"

A: "I'm sorry but I'd like a lawyer's advice before making a statement."

4. Deny all accusatory statements by arresting lawyers officers with, "I am not guilty and I'd like to contact a lawyer." Otherwise, your silence before witnesses can be construed in court as assent.

5. If an officer insists on taking you to jail, ask when you are booked (registered) what the charges against you are.

486. See *id.* amend. VIII.

487. See *id.* amend. VI.

488. See *id.* amend. VIII.

489. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (recognizing the extension of due process to all constitutionally unreasonable federal or state searches).

6. Insist on using a telephone to contact your lawyer or family.
7. DO NOT SIGN ANYTHING. Take numbers of arresting men.
8. You have a right to be released on bail for most offenses. Have your attorney make the arrangements. Or you may ask for a bail bond broker. For a fee, he will post (deposit with the police) amount needed for your release.
9. Under no circumstances have the police a right to manhandle, beat or terrorize you. REPORT ALL SUCH INCIDENTS.
10. If you do not have an attorney by the time you are required to plead guilty or not guilty, remember this:
 - a. You are entitled to a copy of the charges made against you.
 - b. You are entitled to have a lawyer. Ask for a postponement until you get legal representation.
11. PLEAD NOT GUILTY.
12. Ask for a trial by jury unless your lawyer advises otherwise.
13. You are not required to testify against yourself in any trial or hearing.
14. If you are questioned by a member of the FBI, you are not required to answer. Immediately consult an attorney so that your rights may be adequately protected.⁴⁹⁰

Many defendants, however, could not afford attorneys or were too embarrassed by the arrest to contact an attorney. Without counsel, such defendants were prone to confess to police or to plead guilty to spurious charges. One Dade County, Florida, judge reportedly made this comment regarding homosexuals swept up in bar raids: "I've seen too many cases in my court where the prosecution is ready to drop charges, but some damned fool pleads guilty, so I'm forced to fine or sentence the man."⁴⁹¹ The rights listed in *One* were supplemented by judicial decisions creating new rights and procedures in the 1950s and early 1960s.

2. Judicial Monitoring of Police Tactics

At a March 12, 1952, meeting of the fledgling Mattachine Foundation, Dale Jennings recounted his arrest by an undercover cop who had followed him home from a public toilet, virtually forced his way into Jennings' apartment and then made the arrest for lewd vagrancy.⁴⁹² With Harry Hay's encouragement, Jennings decided to fight the arrest. The Mattachine endorsed this course of action and established the Citizens' Committee to Outlaw Entrapment to raise

490. *Your Rights in Case of Arrest*, ONE, Jan. 1954, at 14; see also Alison Hunter, ONE, Mar. 1961, at 4-5. In the 1960s, San Francisco's Society for Individual Rights and the Mattachine Society of Washington printed similar lists on pocket-sized cards.

491. Charles K. Robinson, *The Raid*, ONE, July 1960, at 26.

492. See Jennings, *supra* note 79, at 10-13; see also *supra* text accompanying notes 79-85.

money and public consciousness.⁴⁹³ In its pamphlet, *An Anonymous Call to Arms*, the Committee laid out the abuses engaged in by decoy cops, including blackmail and perjured convictions. Two fundraising events secured \$1500, enough to retain a good attorney, George Shibley. At trial, the defense admitted that Jennings was homosexual but denied that he had engaged in any prohibited conduct. Shibley argued that the police officer lied and caught him in an apparent contradiction. The jury deliberated for forty hours and deadlocked when one juror said he would vote a homosexual guilty "until Hell froze over." The judge dismissed the charges.

The Jennings case was significant in several respects. It strongly reinforced the Mattachine's interest in rights discourse and established the group as the focal point for homosexual resistance in Southern California. In the mid-1950s, chapters formed in San Francisco, Washington, and Denver serving similar functions in these communities. Moreover, the case illustrated the abuses inherent in law enforcement by decoy cops and their trickery, which was troubling to mainstream lawyers and judges.⁴⁹⁴ This focus on police misconduct served as a bridge between homosexual rights and mainstream tolerance.

Entrapment could be an attractive defense to lewd vagrancy or solicitation prosecutions insofar as it focused attention on police conduct and away from disapproved homosexuality. This tended to be the approach followed by California judges, who asked, "Was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense?"⁴⁹⁵ As the Jennings case illustrates, entrapment sometimes served as a viable defense in California, although vice squads predictably responded by requiring their decoys to wait for suspects to make an overt act.⁴⁹⁶ Most other jurisdictions and the federal government, however, focused on a requirement that the defendant establish that he had no predisposition to commit the crime.⁴⁹⁷ This approach shifted attention back to the defendant. The prosecution then refocused the case on the defendant's "homosexual tendencies" or prior sex offense convictions.⁴⁹⁸ Consequently, entrapment was a limited defense in most jurisdictions.

493. The account that follows is taken from Jennings, *supra* note 79, at 13.

494. See Donnelly, *supra* note 73, at 1091.

495. *E.g.*, *People v. Barraza*, 591 P.2d 947, 955 (Cal. 1979) (elaborating upon *People v. Perez*, 401 P.2d 934 (Cal. 1965)); see also MODEL PENAL CODE § 2.13(1) (1962).

496. See Gallo et al., *supra* note 65, at 701-07.

497. See, *e.g.*, *Sherman v. United States*, 356 U.S. 369, 372 (1958); *Sorrells v. United States*, 287 U.S. 435, 442 (1932).

498. See Donnelly, *supra* note 73, at 1102. Some courts rejected the use of prior convictions. See, *e.g.*, *Sherman*, 356 U.S. at 375. Other courts rejected testimony on general reputation. See, *e.g.*, *United States v. Collier*, 313 F.2d 157, 159-60 (7th Cir. 1963).

The conservative federal entrapment rule bound the District of Columbia courts, but the U.S. Court of Appeals for the D.C. Circuit devised another evidentiary rule to regulate the risk of abusive tactics. In *Kelly v. United States*,⁴⁹⁹ Judge E. Barrett Prettyman overturned the conviction of an analyst for the Public Health Service for soliciting sex from an undercover police officer.⁵⁰⁰ The officer was the only witness to the alleged solicitation.⁵⁰¹ Judge Prettyman observed that the ability of a police officer to ruin the personal and professional life of a man merely by alleging a homosexual proposition ran the risk of abuse, i.e., blackmail, as well as mistaken impressions.⁵⁰² To manage these risks, the court imposed procedural protections for defendants in undercover cop cases: the testimony of a single witness to homosexual solicitations should be received "with great caution;" the defendant ought to be able to introduce evidence of good character; and, ordinarily, trial judges in the District ought to "require corroboration of the circumstances surrounding the parties" and their interaction.⁵⁰³ In 1956, the court extended the *Kelly* rule to homosexual assault (fondling) cases.⁵⁰⁴

Kelly was potentially a milestone decision for curtailing entrapment by decoy cops, but its rule was rejected in most other jurisdictions.⁵⁰⁵ Generally, judges and juries in the District continued to convict homosexuals based upon nothing more than the decoy's evidence, and the municipal court of appeals repeatedly affirmed.⁵⁰⁶ One of the *Kelly* safeguards proved to be double-edged, in that encouraging defendants to introduce character evidence exposed the secrets in the closet. *Kelly*'s own conviction was overturned in part because his coworkers were willing to vouch for his good character, i.e., heterosexuality, and he plausibly claimed that he was walking through the park after a date with a woman.⁵⁰⁷ In other cases, girlfriends or even wives served as character witnesses.⁵⁰⁸ But once the defendant's character was invoked, the prosecution could usually

499. 194 F.2d 150 (D.C. Cir. 1952).

500. *See id.* at 155.

501. *See id.* at 151.

502. *See id.* at 153-54.

503. *Id.* at 154-55. *Kelly* overruled decisions of the Municipal Court of Appeals that had allowed such convictions, such as *Brenke v. United States*, 78 A.2d 677 (D.C. 1951).

504. *See Guarro v. United States*, 237 F.2d 578, 580 (D.C. Cir. 1956).

505. *See, e.g., King v. United States*, 90 A.2d 229, 231-32 (D.C. 1952).

506. *See Berneau v. United States*, 188 A.2d 301, 302 (D.C. 1963) (holding *Kelly* inapplicable to transvestite prostitute's solicitation of decoy cop). The court required little more than corroboration that the decoy and defendant were both present at the alleged time and place. *See id.* at 302; *see also Reed v. United States*, 93 A.2d 568, 569-70 (D.C. 1953) (involving an officer's testimony that was uncorroborated except as to time and place); *King*, 90 A.2d at 231 (D.C. 1952); *Bicksler v. United States*, 90 A.2d 233, 234-35 (D.C. 1952).

507. *See Kelly*, 194 F.2d at 152.

508. *See, e.g., King*, 90 A.2d at 230 (upholding conviction despite character testimony).

impeach it by introducing evidence of prior homosexual acts. In *Dyson v. United States*,⁵⁰⁹ the municipal court of appeals upheld the trial court's consideration of the defendant's admission of prior homosexual acts, over Judge Hood's objection that this undermined the *Kelly* rule.

The most important procedural defense developed specifically in California involved police surveillance of public toilets. In 1962, the California Supreme Court held that covert spying into enclosed public stalls invaded "the personal right of privacy to the person occupying the stall," inconsistent with the person's Fourth Amendment right to be free of unreasonable search and seizure.⁵¹⁰ By extending the protective closet to include "water closets," the court was empowering homosexual cruisers vis à vis spying police.

3. Evidentiary Rules

Jurists such as Justice Carter in California, Judges Hood and Prettyman in the District of Columbia, and Magistrate Solomon in New York admonished prosecutors for trying to gain convictions on the basis of defendants' homosexual status rather than their conduct. The principle that status ought not be a crime was unevenly applied in urbanized jurisdictions with large homosexual subcultures and substantial vice squads.⁵¹¹

In 1946, just before the panic began, the Oklahoma Court of Criminal Appeals overturned the crime-against-nature conviction of the Reverend Kenneth Cole, accused of sodomizing a fourteen year-old-boy in his congregation.⁵¹² The court found the boy to be a consenting accomplice—an inference derived because the boy attended church the next day and failed to complain immediately.⁵¹³ The court required his testimony to be corroborated; however, it was not.⁵¹⁴ Five years later, the same court upheld the conviction of Cleveland Doss Woody for committing an unnatural act upon a fifteen-year-old boy.⁵¹⁵ As in *Cole*, there was no evidence of coercion against the boy, yet the court refused to apply the accomplice rule because the

509. 97 A.2d 135 (D.C. 1953).

510. *Bielecki v. Superior Court*, 371 P.2d 288, 299 (Cal. 1962). The decision was rejected in *Smyda v. United States*, 352 F.2d 251 (9th Cir. 1965).

511. See *Robinson v. California*, 370 U.S. 660, 666 (U.S. 1962) (reversing a conviction essentially for the status of being a drug addict).

512. See *Cole v. State*, 175 P.2d 376, 380 (Okla. Crim. App. 1946). Reverend Cole was convicted of sodomy in *Cole v. State*, 179 P.2d 176 (Okla. Crim. App. 1947).

513. See *Cole*, 175 P.2d at 379.

514. See *id.* at 378-79. The requirement that accomplice testimony be corroborated was the old common-law rule, which was often codified by statute, for rape as well as sodomy cases. The conviction was reversed for lack of corroboration. See *id.* at 380.

515. See *Woody v. State*, 238 P.2d 367, 373 (Okla. Crim. App. 1951).

defendant had failed to request it in a jury instruction.⁵¹⁶ Judge John Powell justified the relaxed proof requirement by observing that:

[a]t any rate, perversion is sufficiently prevalent [sic] that the moral forces of our State and Nation should 'view with alarm' and become greatly concerned. . . . And while this class of case here presented is shocking, and a consideration and treatment of the facts and issues is approached with revulsion, courts, as well as officers, parents and the moral forces of this State and Nation, must not shirk the onerous task involved in such problems, if a Sodom and Gomorrah is to be forestalled.⁵¹⁷

Later, Judge Powell and his colleagues delivered another sermon on the threat to moral standards posed by "perverts" and again ignored the accomplice rule.⁵¹⁸

The tendency of many courts to allow prosecutors to put the defendant's sexual orientation on trial is best illustrated by the evidentiary rules applied in such cases. The leading decision was that of the Arizona Supreme Court in *State v. McDaniel*.⁵¹⁹ The mother of a fourteen-year-old boy charged that Winston McDaniel, a high school teacher, performed fellatio on the boy while transporting him home one evening.⁵²⁰ In addition to the testimony of the boy, the state introduced evidence that McDaniel was homosexual.⁵²¹ The appeals court readily allowed the arresting officer to testify that, in casual conversation after the arrest, McDaniel admitted seeking medical help and receiving shots to cure "his proclivity or desires for having unnatural sex acts with persons of the same sex as he."⁵²² The court held that the admission was not subject to the rules governing admissibility

516. See *id.* at 373.

517. *Id.* at 371.

518. See *Berryman v. State*, 283 P.2d 558, 566 (Okla. Crim. App. 1955) (upholding a five-year sentence for apparently consensual oral sex between an adult and a 15-year-old boy). The court observed:

In recent months there has been an increase in the number of cases called to our attention which involve homosexuals and other sex deviators. . . . "Exposure to the sex deviate may have a decisive and harmful effect upon a child's development of a normal sex life as an adult. Despite their differences of opinion, students of homosexuality seem to agree that exposure during adolescence may be the precipitating factor in the adult development of the homosexual or the Lesbian. The law must make it possible to take effective action against twisted adults who use children and minors as sexual objects."

See *id.* at 565 n.1 (quoting MORRIS PLOSCOWE, *SEX AND THE LAW* (1951)). The only leniency shown by the court was Judge Powell's vote to reduce the prison sentence from five to four years. His appeal for a shorter sentence was based upon "the duty of the State to attempt the rehabilitation of sex perverts in view of the demoralization and moral decay brought about by such persons" and the judge's fear that "perverts" such as Berryman would "prey" on young boys in prison. *Id.* at 566 (Powell, J., on rehearing).

519. 298 P.2d 798 (Ariz. 1956).

520. See *id.* at 799.

521. See *id.* at 800-01.

522. *Id.*

of confessions.⁵²³ However, the court was more cautious than most other courts of the 1950s, which routinely admitted confessions by homosexual suspects to their arresting officers.⁵²⁴

The *McDaniel* court further permitted the testimony of three youths who said that *McDaniel* had solicited oral sex from them prior to the charged incident.⁵²⁵ Judge Nicholas Udall upheld the evidence on the ground that it was introduced only to show the defendant's *modus operandi* and not his commission of other felonies.⁵²⁶ Relying on *Kelly*, Judge Udall reasoned that:

Certain crimes today are recognized as stemming from a specific emotional propensity for sexual aberration. The fact that in the near past one has given way to unnatural proclivities has a direct bearing upon the ultimate issue whether in the case being tried he is guilty of a particular unnatural act of passion. The importance of establishing this fact far outweighs the prejudicial possibility that the jury might convict for general rather than specific criminality.⁵²⁷

McDaniel reflected the majority rule that most state courts allowed prior homosexual acts, whether the basis of an arrest or conviction, to be introduced to prove defendant's *modus operandi* or, simply, his propensity to commit such crimes.⁵²⁸ The Kansas Supreme Court allowed the state to introduce "physical culture literature" and pictures of "unnatural sexual intercourse" to show defendant's "disposition" to commit the crime of sodomy.⁵²⁹ The Ohio Court of Appeals held that "any act of the defendant, which . . . tends to show a course of lascivious conduct, degeneracy and sexual perversion is admissible" to show his "character and moral disposition."⁵³⁰

523. See *id.* at 801.

524. See, e.g., *State v. Kehm*, 103 A.2d 781, 782 (Del. Super. Ct. 1954) (admitting confession of defendants after high-speed chase). In *Dyson*, for example, the admissibility of the defendant's confession was considered too obvious to justify an extended discussion. See *Dyson v. United States*, 97 A.2d 135, 135 (D.C. 1953).

525. See 298 P.2d at 801-02. The traditional Anglo-American rule is that evidence of prior crimes is inadmissible on the ground that its relevance to the probability that defendant committed the charged crime is outweighed by its likely prejudice to the defendant as a "bad person." See CHARLES T. MCCORMICK, *HANDBOOK ON THE LAW OF EVIDENCE* 327 (1954); Herman L. Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385, 408-09 (1952).

526. See *McDaniel*, 298 P.2d at 802.

527. *Id.*

528. See *State v. Huntington*, 80 N.W.2d 744, 748-49 (Iowa 1957) (holding proof of prior acts are admissible); *Willett v. State*, 584 P.2d 684, 685 (Nev. 1978) (specifically adopting the *McDaniel* Rule); *State v. Desilets*, 73 A.2d 800, 802 (N.H. 1950) (finding a prior act was admissible to show a plan).

529. *State v. Fletcher*, 256 P.2d 847, 848-49 (Kan. 1953) (holding that the trial court did not err in permitting admission of advertising material and sexual photographs for the limited purpose of proving the defendant's disposition).

530. *State v. Shively*, 176 N.E.2d 436, 439 (Ohio Ct. App. 1960) (following *State v. Jackson*, 81 N.E.2d 546, 548 (Ohio Ct. App. 1948)).

Some judges—notably those in California—were more reluctant to allow such evidence. In *People v. Giani*,⁵³¹ the court affirmed the reversal of a conviction because the prosecutor asked the defendant if he was homosexual in order to demonstrate a propensity to violate the oral copulation law.⁵³² The court reasoned that such inquiries would come close to indicting “an entire segment of the population” and asked if an admission from the defendant that he was heterosexual would be admissible evidence in a rape case.⁵³³ In other states, the main debate was whether defendants could introduce expert evidence that they were not homosexual. In *People v. Jones*,⁵³⁴ the Supreme Court of California ruled that the trial judge committed prejudicial error when he refused to allow the defendant to present psychiatric evidence establishing that he was not a “sexual deviate.”⁵³⁵ The New Jersey Supreme Court rejected such evidence as excessively speculative but required judges to allow spouses and family to attest to defendants’ heterosexuality.⁵³⁶ The leading Pennsylvania case rejected both approaches with the view that “many admitted sodomists are also given to the more normal and accepted methods of sexual expression.”⁵³⁷

A defendant accused of same-sex intimacy could usually offer proof that he was heterosexual. The U.S. Court of Military Appeals held that the defendant was entitled to bring in evidence of good character, for that tended to disprove the sodomy charge.⁵³⁸ The court ruled that it was prejudicial error for the legal officer not to give the following instruction to the court martial panel: “The Court is instructed that . . . an established reputation of good character would alone create a reasonable doubt, although without it the other evidence would be convincing” that the defendant had committed sodomy.⁵³⁹

C. Substantive and Procedural Privacy (Civil)

The specific substantive and procedural privacy rights discussed in the foregoing sections were largely inapplicable in the civil setting, where the government was normally depriving the homosexual of employment, security clearances, and job opportunities. However, the core concepts of due process were fully applicable. Procedurally,

531. 302 P.2d 813 (Cal. Dist. Ct. App. 1956).

532. See *id.* at 813.

533. *Id.* at 815.

534. 266 P.2d 38 (Cal. 1954).

535. *Id.* at 43.

536. See *State v. Sinnott*, 132 A.2d 302, 309-10 (N.J. 1957).

537. *Commonwealth v. Tacconelli*, 45 Pa. D. & C.2d 654, 659 (Crim. Ct. 1968).

538. See *United States v. Phillips*, 11 C.M.R. 137, 142 (C.M.A. 1953).

539. *Id.* at 141.

the state had to give the individual notice and a meaningful right to be heard before it could deprive her of important governmental benefits. Substantively, the decision thus rendered could not be arbitrary or inconsistent with legal requirements. These due process precepts had little bite for homosexuals in the 1950s, though.

Before the anti-homosexual terror began in earnest, it was often possible for apparent lesbians and gay men to protect their jobs, even if at a price. Miriam Van Waters, for example, appealed to the Governor of Massachusetts to preserve her job as superintendent of the Reformatory for Women in 1948, and in March 1949, a panel appointed by the Governor recommended she be retained.⁵⁴⁰ Estelle Freedman believes that Van Waters was saved, in part, by society's confusion about the existence or nature of lesbianism.⁵⁴¹ Although her Harvard-trained lawyer denied any homosexuality at the prison, Van Waters sidestepped such questions by insisting that her duty was to help rehabilitate the women (her success was astounding) and that the psychiatrists should deal with any sexual relationships.⁵⁴² Van Waters' own bonds with women were lasting and loving, and her unwillingness to save her job and good name by denouncing homosexuality at the prison was admirable in 1948-49. In 1957, just before Van Waters was to retire, the Boston newspapers rekindled the old charges of perversion.⁵⁴³ A legislative committee reported that "aggressive homosexuals and belligerent non-conformists" engaged in "unnatural acts" and "indoctrinated the new admissions," unchecked by the administration.⁵⁴⁴ In October 1957, after twenty-five years of service, Margaret O'Keefe, Van Waters' deputy and friend during the 1948-49 witch hunt and her designated successor, resigned under pressure.⁵⁴⁵

If Van Waters survived the purge in 1949, others like O'Keefe did not in the 1950s. Unlike Van Waters, most survivors relied on the deep closet—daily performances of heterosexuality—to keep their jobs. It is striking how few relied on the law to protect themselves from being fired or arbitrarily losing professional licenses. The U.S. Supreme Court held that government employees enjoyed some constitutional assurance of fair treatment⁵⁴⁶ and in the 1950s regularly

540. See FREEDMAN, *supra* note 260, at 272-73.

541. See *id.*

542. See *id.* at 285.

543. See *id.* at 335-36.

544. *Id.*

545. See *id.* at 337.

546. See *United Pub. Workers v. Mitchell*, 330 U.S. 75, 102-03 (1947); see also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 185 (1951) (finding that a hearing is required before an organization can be designated as "subversive"). "The fact that one may not have a legal right to get or keep a government post does not mean that he can be adjudged ineligible illegally." *Id.* at 185 (Jackson, J., concurring).

overturned state employment policies aimed at political dissenters.⁵⁴⁷ In 1958, the Court held that courts had jurisdiction to review military administrative discharges.⁵⁴⁸ In 1957, the Court recognized state interest in "good character" requirements for the bar but held that "it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such [a] way as to impinge on the freedom of political expression or association."⁵⁴⁹ These principles were more neutrally applied to "political deviants" than they were applied to "sexual deviants" in the 1950s.

In government employment, "sex perverts" had few legal protections. President Eisenhower's 1953 executive order, for example, forbade judicial review of personnel decisions, a posture the Supreme Court did nothing to challenge.⁵⁵⁰ Military separations were governed by administrative procedures, which were, in the large majority of cases, short-circuited by pressuring the suspected homosexual to resign. The protective closet gave such threats enormous persuasive power. Even if the suspect wanted to fight the discharge administratively or in court, there were usually no lawyers willing to help.

In 1951, in response to an Air Force member's petition for assistance, the ACLU advised that she seek medical treatment in order to "abandon homosexual relations."⁵⁵¹ In 1957, the ACLU's National Board of Directors issued a similar opinion, stating that "[h]omosexuality is a valid consideration in evaluating the security risk factor in sensitive positions. . . . It is not within the province of the Union to evaluate the social validity of the laws aimed at the suppression or elimination of homosexuals."⁵⁵²

A handful of accused homosexuals instituted legal challenges. The case of Corporal Fannie Mae Clackum demonstrates how removed from normal legal procedures the military could become in the 1950s. Clackum, a reservist in the Women in the Air Force

547. See *Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (invalidating state statute requiring teachers to disclose organizational affiliations); *Schwartz v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 247 (1957) (holding that the state denied a political dissenter due process by denying him the opportunity to qualify for the bar); *Slochow v. Board of Higher Educ.*, 350 U.S. 551, 559 (1956) (holding the discharge of an employee for invoking her Fifth Amendment rights was a violation of due process). *But see* *Lerner v. Casey*, 357 U.S. 468, 478-79 (1958) (retreating from the position that an employee discharge for invoking a Fifth Amendment right was a violation of due process). See *Wieman v. Updegraff*, 344 U.S. 183, 189 (1952) (striking down loyalty oath for state employees as a violation of due process); *Garner v. Board of Public Works*, 341 U.S. 716, 720-24 (1951) (reviewing but upholding municipal policy against employing political revolutionaries).

548. *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958).

549. *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 273 (1957).

550. See Exec. Order No. 10,450, 3 C.F.R. 936, 938 (1953).

551. *Bérubé & D'Emilio*, *supra* note 242, at 291.

552. The ACLU resolution is reprinted in *ACLU Position on Homosexuality*, MATTACHINE REV., Mar., 1957, at 7.

(WAF), was repeatedly interviewed in 1951 about homosexuality and was given an opportunity to resign.⁵⁵³ Having no clue as to the charges against her, Clackum demanded a court-martial so she could confront the charges.⁵⁵⁴ The Air Force dishonorably discharged her in January 1952, still without informing her of the precise basis beyond alleged homosexuality.⁵⁵⁵ It did so pursuant to regulations in which the Air Force reserved the power to issue a dishonorable discharge when lacking sufficient evidence to support a court-martial.⁵⁵⁶ Although Corporal Clackum received a hearing on administrative appeal, the tribunal upheld her discharge based upon secret, hearsay-ridden affidavits that Clackum never saw until long after her case was pending in court.⁵⁵⁷ Unlike thousands of other women and men drummed out of the military on such charges, Clackum sued. In sustaining her claim, the Court of Claims held the discharge invalid because it accomplished "without any semblance of an opportunity to know what the evidence against her was, or to face her accusers in a trial or hearing."⁵⁵⁸

Most of the legal protections theoretically available were not accessed by civilian federal employees until the ACLU—notwithstanding its endorsement of the policy against homosexuals in government—started taking these cases in the late 1950s. In 1961, the Mattachine Society of Washington was founded. While *Clackum* rested upon the procedural dimension of due process protection, a few other litigants pressed the substantive dimension, by which government could not penalize employees without objective and defensible reasons.

William Lyman Dew was an Air Force veteran who worked as a file clerk with the CIA.⁵⁵⁹ To obtain a security clearance, he took a lie detector test that revealed that in 1950 he had engaged in at least four "unnatural sex acts" with males, some of them for money, when he was eighteen or nineteen years old.⁵⁶⁰ Under pressure, he resigned from the CIA but later rejoined the government as an air traffic controller.⁵⁶¹ When the Civil Aeronautics Authority learned of his admission to the CIA, it terminated his employment.⁵⁶² Dew denied he was homosexual and introduced expert psychiatric evidence that

553. See *Clackum v. United States*, 296 F.2d 226, 226 (Ct. Cl. 1960).

554. See *id.* at 226.

555. See *id.* at 227.

556. See *id.* at 227.

557. See *id.* at 229.

558. *Id.*

559. See *Dew v. Halaby*, 317 F.2d 582, 582 (D.C. Cir. 1963), *cert. dismissed*, 379 U.S. 951 (1964).

560. *Id.* at 582.

561. See *id.*

562. See *id.*

he did not have "homosexual personality disorder."⁵⁶³ Dew also introduced evidence that he was happily married and had two children.⁵⁶⁴ Notwithstanding these trophies of heterosexuality, Dew was discharged in 1960. The D.C. Circuit denied his appeal.⁵⁶⁵ The majority deferred to the administrative hearing officer, who had found that anybody who commits acts "repugnant to . . . decency and morality" would undermine "the efficiency of [the service]," the criterion for federal employment separation.⁵⁶⁶ Judge J. Skelly Wright dissented. He emphasized that "Dew is normal in all respects" and that there was no rational connection between adolescent sexual experimentation and Dew's ability to be an air traffic controller, a "job which he badly needs to support his wife and two children."⁵⁶⁷ Although the court upheld Dew's dismissal, the agency reversed itself and promptly restored Dew to his former position after the Supreme Court granted review in the case.⁵⁶⁸

Clackum and *Dew*, the first reported cases in which accused homosexuals won their jobs back, were themselves evidence of the power of the closet. William Dew presented himself as a wronged heterosexual, and Fannie Mae Clackum secluded her sexuality behind procedural veils. Like entrapment and unlawful search defenses in criminal cases, the due process argument in employment cases deployed classic libertarian technique: shift focus from the shameful substance (homosexuality) to neutral procedure (state misbehavior). The libertarian strategy not only paralleled the protective closet but also helped create it by offering homophile groups and moderate homophobes a common ground. It appeared that homosexuals would be left alone if they did not rock the boat.

III. RESISTANCE: THE GAY-THREATENING CLOSET

By 1961, the outlines of a mutually protective closet were in place. Doctors and most legal experts advocated a "don't ask, don't tell" approach, in which discreet homosexuals would be left alone by the police and the civil service, with criminal and civil sanctions limited to homosexuals who violated third-party rights through public solicitation or indecent exposure, sex by force or with a minor, and lewdness on the job and in public spaces. This was a position congenial to the authors of the leading state sex offender studies in the early 1950s,

563. *Id.* at 583.

564. *See id.* at 583 n.3.

565. *See id.* at 589.

566. *Id.* at 587 n.10.

567. *Id.* at 591 (Wright, J., dissenting).

568. *See Dew v. Halaby*, 379 U.S. 904 (1964), *cert. dismissed per stip.*, 379 U.S. 951 (1964).

including Professor Francis Allen and Dr. Charles Bowman (Illinois), Dr. Karl Bowman (California), Dr. Bernard Glueck (New York), and Paul Tappan (New Jersey); the American Law Institute and its most distinguished member, Judge Learned Hand; Justice Jesse Carter (California), Judges Barrett Prettyman and Andrew Hood (D.C.), Magistrate Charles Solomon (New York), and probably Chief Justice of the United States Earl Warren; Admiral R.H. Crittenden, as well as the Fort Oglethorpe, Georgia investigators, Lieutenant Colonel Birge Holt and Captain Ruby Herman; journalists like John Gerassi, who chronicled the "Boys of Boise" scandal, and Jess Stearn, who authored a best-seller on the gay underground; Governors Pat Brown of California and Nelson Rockefeller of New York; and Drs. Walter Stokes and Paul Kapchan of the panel of experts advising Florida's Johns Committee. Their willingness to afford people substantial privacy in their personal sexual affairs was a position that would have appealed to Miriam Van Waters and Margaret O'Keefe in Massachusetts, Eldridge Rhodes and Thomas Earl in San Diego, Dale Jennings and his Mattachine colleagues in Los Angeles, the women patronizing Jimmie White's Tavern in Tampa, the mother of Merrill Bodenheimer in Houston, WAC Sergeant Johnnie Phelps and WAF Corporal Fannie Mae Clackum, William Lyman Dew of Washington, D.C., teachers like Thomas Sarac and attorneys like Arthur Boyd in California, Senators David Walsh and Lester Hunt, and bar owners Pearl Kershaw, Helen Nickola, and Sol Stoumen.

While the outlines of such an accommodation were clear and probably in the interest of a nation tired of talk about deviation, the mutually protective closet was only partly in place by 1961. An important barrier was the continuing even if reduced influence of people who considered the gay closet threatening to larger society—Senator Charlie Johns and his allies in Florida; FBI Director J. Edgar Hoover and his intimate friend and professional deputy Clyde Tolson; the hundreds of anonymous censors in the Customs Service, Post Office, and state obscenity boards; San Francisco's gay-bashing Captain William Hanrahan and Mayor George Christopher; Senators Styles Bridges, Alexander Wiley, and George Smathers, McCarthyites still in the Senate in 1961; thousands of vicious police officers who beat, raped, and blackmailed homosexuals across the United States; and President Dwight Eisenhower and his crusading Postmaster General, Arthur Summerfield. Like-thinking people and their constituencies not only stood as an impediment to legal reform along the lines of the Model Penal Code and the Crittenden Report, but also ensured the instability of the mutually protective closet. Because some in power were willing to attack and hurt homosexuals, the closet could never be a secure hiding place for gay people. Living in the closet not only sacrificed the gay person's integrity, but did so

without much assurance that straight society would respect the closet's private boundaries.

By 1961, lesbians and gay men were increasingly aware of the closet's high emotional costs and angry about its porous boundaries. More of them were choosing to "discard the mask," the term used in the late 1950s for what we today would call "coming out of the closet."⁵⁶⁹ A 1959 article in the *Village Voice* explained why "so many fairies [have] come out in the open" after years of "cring[ing] behind a mask of fear."⁵⁷⁰ According to the interlocutor, "Homosexuals have submitted too weakly until now to judgments from above. . . . Many of us are no longer willing to put up with this degrading of our personalities," specifically, job discrimination, exclusion from the armed forces and government service, sham marriages.⁵⁷¹ "Merely to live, we must assert ourselves as homosexuals," and "accept it or not, we will force our way into open society and you will have to acknowledge us."⁵⁷²

The anger and an insistence on personal integrity were direct consequences of government witch-hunting policies. Indeed, many of the people who asserted themselves as gay were "cast out of the closet" (the Johns Committee's phrase) by state authorities. A teenager arrested for solicitation, a housewife rounded up in a bar raid, a civil servant fired for tearoom loitering, or a WAC separated for suspicions of lesbianism were unmasked, outed by the government. For many of those outed, the only healthy choice was to defy the closet and associate oneself with other gay people. The early leaders of the Mattachine Society of Washington (MSW), founded in 1961, were Frank Kameny and Bruce Scott, both former civil servants whose arrests for solicitation had led to their firing and to the derailment of their first career choices. Angered by their treatment, they fell back on gay activism. Firing Kameny was a particularly bad mistake, for he hectored federal anti-gay policies for the next generation, and even today shows no signs of letting up.

Playwright James Barr (a pseudonym for James Fugat ) was negotiated out of the Navy when it discovered that he was the author of two works dealing with homosexuality. Like the FBI, the Post Office, and the Civil Service Commission, the Navy played a cat-and-mouse game of interrogation with Barr until he agreed to separate. The Navy did not actually out Barr, but its process of gay-bashing led him to an increasing identification with fellow gay people:

569. E.g., Bob Bishop, *Discard the Mask*, MATTACHINE REV., Apr., 1958, at 14-16, 21-24.

570. Seymour Krim, *Revolt of the Homosexual*, reprinted in MATTACHINE REV., May, 1959, at 4.

571. *Id.* at 5, 9.

572. *Id.*

For the first time in my life it was not a completely personal issue with me. Whether I wanted to do so or not, in defending myself I was forced to defend the rights and concepts of a group numbering hundreds of thousands. . . . [F]or me, homosexuality was at last a part of a progressing society.⁵⁷³

Although this epiphany did not occur for many people in the 1950s, it was the beginning of a philosophy that saw the closet as threatening to gay people.

The vicious yet sporadic persecution of the anti-homosexual terror collaborated with the incomplete and inconsistent protection of privacy jurisprudence to make the closet problematic as a rational strategy for gay people. In the half-generation after World War II, law contributed to a conceptual shift from viewing the closet as a desirable refuge against witch hunters and social opprobrium to viewing it as an undesirable prison created by the lies one felt compelled to offer.⁵⁷⁴ Law also contributed to the closet's deconstruction by creating spaces for gay people to form and insist upon a public culture in which they could express themselves and resist social pressure. In the early 1960s, law contributed to fresh voices in the homophile movement who believed that gays should insist upon public equality rather than closeted privacy.

Before World War II, the Supreme Court recognized core rights of political association and expression protected by the First Amendment⁵⁷⁵ and suggested that the Equal Protection Clause could be invoked by "discrete and insular minorities" penalized by a political process infected by "prejudice."⁵⁷⁶ These core rights were obviously most important for political dissenters and despised minorities, for they were the ones most likely to be suppressed by the body politic. However, decisions by the Court during and just after World War II did little to advance these ideals. In the Japanese curfew and internment cases, the Court held that the government needed the strongest justifications for penalizing people because of race, but

573. James (Barr) Fugat , *Release from the Navy Under Honorable Conditions*, MATTACHINE REV., May/June, 1955, at 6, 42.

574. The conceptual shift links up with the linguistic shift noted in the Introduction. The homosexual who "came out of the cloister" in the 1940s did so privately, first to him or herself and then to others in the subculture. The homosexual who "came out of the closet" in the 1960s did so publicly, to the conventional community.

575. See *DeJonge v. Oregon*, 299 U.S. 353, 364-65 (1937) (holding that a peaceful assembly for lawful discussion is protected by the First and Fourteenth amendments); *Hendon v. Lowry*, 301 U.S. 242, 258-59 (1937) (preventing the state from abridging the freedom of speech and assembly by striking down a statute that penalized assembly); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (declaring a state statute unconstitutional because of vagueness that could result in punishment of innocent persons displaying a red flag); *Fiske v. Kansas*, 274 U.S. 380, 386 (1927) (holding that a state statute was an unlawful exercise of police power because it punished persons for lawful acts).

576. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

deferred to the unsubstantiated military judgment that Japanese-Americans were a security risk justifying restrictions on their liberty.⁵⁷⁷ In 1951, the Court upheld the Smith Act, which made the Communist Party and its activities illegal, upon finding that the party's revolutionary goals posed a sufficient danger to the polity as to justify the suppression of free speech.⁵⁷⁸

The Warren Court expanded First Amendment and Equal Protection Clause parameters. In 1957, the Court overturned the convictions of fourteen Communist Party leaders on the ground that much of the evidence against them involved advocacy of abstract ideas, which was strongly protected by the First Amendment, and not concrete illegal action.⁵⁷⁹ The Warren Court's most aggressive activism involved the civil rights of African-Americans, starting with *Brown v. Board of Education*⁵⁸⁰ in which the Court refused to defer to traditional prejudice. In *NAACP v. Alabama*,⁵⁸¹ the Court recognized the right to free association. Overturning Alabama's subpoena of the NAACP's membership lists, the Court held that the First Amendment protects people's right "to pursue their lawful private interests privately and to associate freely with others in so doing."⁵⁸² The Court reiterated that right in *Gibson v. Florida Legislative Investigation Committee*,⁵⁸³ which protected the Miami branch of the NAACP from identifying its members to Florida's Johns Committee.

Similar to the privacy cases, gay people and homophile groups did not win most of the free expression cases during the 1950s. Nonetheless, the principles in those cases gave gay people a fair amount of breathing room that facilitated the growth of lesbian and gay subcultures and, more important, political cooperation. Like Communists, homosexuals could advocate unpopular ideas and could band together for that purpose. As a federal appellate judge stated: "Even homosexuals and reprobates who prey upon their hapless condition are entitled to find refuge in [the Constitution's] dictates. Freedom of association is one of them. Freedom of expression is another."⁵⁸⁴ For gay people, the most important contribution of the free expression

577. See *Korematsu v. United States*, 323 U.S. 214, 223 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 112 (1943).

578. See *Dennis v. United States*, 341 U.S. 494, 516 (1951).

579. See *Yates v. United States*, 354 U.S. 298, 303, 313-14 (1957), *overruled on other grounds by* *Burks v. United States*, 437 U.S. 1, 10 (1978); *Scales v. United States*, 367 U.S. 203 (1961); *Noto v. United States*, 367 U.S. 290, 297 (1961); Norman Dorsen, *The Second Mr. Justice Harlan: A Constitutional Conservative*, 44 N.Y.U. L. REV. 249, 263-65 (1969).

580. 347 U.S. 483 (1954).

581. 357 U.S. 449 (1958).

582. *Id.* at 466.

583. 372 U.S. 539, 543 (U.S. 1963).

584. *United States v. Zuideveld*, 316 F.2d 873, 883 (7th Cir. 1963) (Swygert, J., dissenting).

and equal protection jurisprudence was that it served as a complement or a counterpoint to the confining privacy jurisprudence.

A. Freedom of Association (The Homophile Organizations and Bar Cases)

The Daughters of Bilitis and the Mattachine Society tailored their goals precisely around First Amendment protection. The Mattachine described itself as "a group of persons interested in doing research, education, and conducting social action for the benefit of the variant minority and, in turn, for the benefit of society as a whole."⁵⁸⁵ Its mission statement emphasized that it intended "to accomplish this program in a law-abiding manner. The Society is not seeking to overthrow or destroy any of society's existing institutions, laws or mores, but to aid the assimilation of variants as constructive, valuable and responsible citizens."⁵⁸⁶ The Society specifically denounced public sex, sex with minors, and coercive intercourse. Even the extremely homophobic FBI was able to conclude, after a six-month investigation, that the Mattachine Society was not an illegal subversive organization like the Communist Party (nor even a Communist front, as the Director suspected).

The Daughters of Bilitis were so safe under the First Amendment (or under stereotypes about women's organizations) that the FBI never opened an investigation of them. Their goals were "to enlighten the public about the Lesbian and to teach them that we aren't the monsters that they depict us to be,"⁵⁸⁷ and to "offer[] the Lesbian an outlet in meeting others. She can talk over her problems with people versed in experience and study of her nature."⁵⁸⁸ That the Daughters, like the Mattachine, went so far out of their way to depict their activities as nonpolitical and educational probably reflected the fear both groups had in the early 1950s that state suppression of the Communist Party, reaffirmed by the Supreme Court in 1951, could turn on them. Thus, early on, the First Amendment was not understood as much of a prod toward publicity. Most of the members of the Daughters and Mattachine were so frightened of exposure that they used pseudonyms even among themselves.

The First Amendment had other obvious limits that contributed to the closeting of even these brave people. No one thought that the constitutional guarantee of free speech protected someone caught soliciting another person for sodomy or that the guarantee of free

585. THE MATTACHINE SOCIETY, *THE MATTACHINE SOCIETY TODAY* 1 (1954).

586. *Id.* at 8. The Society was also "unalterably opposed to Communists and Communist activity." *Id.* The Communist Party returned the favor and expelled homosexuals from its ranks.

587. D. Griffin, *President's Message*, *THE LADDER*, Nov. 1956, at 2.

588. Del Martin, *The Positive Approach*, *THE LADDER*, Nov. 1956, at 8-9.

association protected either Communists or homosexuals from being fired from government jobs. This constitutional demarcation contributed to the protective closet, in which homosexuals had some outlet for discussion so long as they were discreet. Although the state could not force homophile groups to turn over membership lists, the state could discover memberships through spying and stool pigeons. This constitutional demarcation permitted space for the threatening closet, into which the state could at any time pry to assure itself that the homosexual was not about to break out and overthrow the country.

During the anti-homosexual terror, the most sustained legal resistance involving homosexual association arose out of the revocation of liquor licenses. Lesbian and gay bars were apparently profitable; not only did they flourish, but many neighborhood bars, such as Hazel Nickola's in San Matteo, California, "went gay" and prospered. When regulators sought to take away their licenses, some bar owners retained counsel and got stays during the appeal process. (Most bar owners, it appears, either paid off investigating agents or closed their bars and reopened them under a new name.) On appeal, there would sometimes be amicus briefs filed by ACLU or allied attorneys. Sol Stoumen, the owner of San Francisco's Black Cat, spent more than \$38,000 in legal fees over the course of a decade.⁵⁸⁹ Challengers were most successful when they could rely on procedural technicalities.

Even the moderate anti-homosexual states such as New Jersey and New York initially refused to consider arguments resting upon the social needs of homosexuals to congregate. In 1952, the New York Court of Appeals held that the SLA could close bars that became regular resorts of homosexuals.⁵⁹⁰ The only cases that regulators seemed to lose in the 1950s were those where shocked police officers provided insufficient details to pin a bar to congregating deviants.⁵⁹¹ The SLA tended to win all the cases in which it relied on detailed affidavits by its undercover investigators, who returned time and again to an establishment to be shocked and fondled. New Jersey's courts were even more acquiescent. In the leading case, the ABC suspended the license of Paddock's Bar simply for "permitting persons who conspicuously displayed by speech, tone of voice, bodily

589. See *Tenth Life for the Black Cat?*, MATTACHINE REV., Nov. 1963, at 5-7.

590. See *Lynch's Builders Restaurant v. O'Connell*, 103 N.E.2d 531, 531 (N.Y. 1952); see also *Gilmer v. Hostetter*, 245 N.Y.S.2d 252, 253 (App. Div. 1963).

591. See *Stanwood United, Inc. v. O'Connell*, 126 N.Y.S.2d 345, 346-47 (App. Div. 1953) (declaring that a police officer's testimony concerning one incident was insufficient to revoke the petitioner's liquor license); *People ex rel. Fasone v. Arenella*, 139 N.Y.S.2d 186, 190-91 (N.Y. Magis. Ct. 1954) (requiring substantial evidence to prove a violation of an ABC law).

movements, gestures, and other mannerisms the common characteristics of homosexuals *habitually* and *in inordinate numbers* (on one occasion, as many as 45) to *congregate* at the tavern, which, incidentally, was advertised to be "The Gayest Spot in Town."⁵⁹² Although there was no evidence of lewd solicitation or even conclusive evidence that the patrons were practicing homosexuals, the court upheld the suspension based upon the philosophy that immoral activity should be nipped in the bud, even before the danger of actual immorality materializes.⁵⁹³

Only one state's courts offered rule-of-law protections for gay bars. In 1951, the California Supreme Court overturned the revocation of the Black Cat's liquor license in *Stoumen v. Reilly*.⁵⁹⁴ The Board of Equalization rested its decision on the undisputed fact that homosexuals socialized at the Black Cat with Stoumen's knowledge.⁵⁹⁵ The supreme court held that this was legally insufficient and stated: "Members of the public of lawful age have a right to patronize a public restaurant and bar so long as they . . . are not committing illegal or immoral acts."⁵⁹⁶ It was not clear whether that right was constitutional, common-law, or merely statutory, but unlike the New York and New Jersey courts, the California court relied on the right as the basis for holding that the ABC statute was not violated by proof of "patronage of a public restaurant or bar by homosexuals . . . without proof of the commission of illegal or immoral acts on the premises."⁵⁹⁷

Arriving at the height of the anti-homosexual terror, *Stoumen* was a brave decision, though the court hedged its bets by declining to set forth the source of the right. The California Legislature responded in 1955 with the statutory amendment quoted in Part I.⁵⁹⁸ The amendment threw down the legislative gauntlet. The ABC closed down homosexual bars right and left, including Hazel Nickola's bar, Pearl Kershaw's bar, and of course the Black Cat.⁵⁹⁹ In a test case, Mary Azar and Albert Vallerga, owners of the First and Last Chance Bar in Oakland, conceded that their bar was a resort for homosexuals and argued that the 1955 amendment was uncon-

592. *Paddock's Bar, Inc. v. Division of Alcoholic Beverage Control*, 134 A.2d 779, 780 (N.J. Sup. Ct. 1957) (emphasis added).

593. See *id.* To the same effect were *Inman v. City of Miami*, 197 So. 2d 50, 51 (Fla. 3d DCA 1967); *Kottelman v. Grevemberg*, 96 So. 2d 601, 603 (La. 1957); *Murphy's Tavern, Inc. v. Davis*, 175 A.2d 1, 5 (N.J. Super. Ct. App. Div. 1961); *In re Freedman*, 235 A.2d 624, 625 (Pa. Super. Ct. 1967).

594. 234 P.2d 969, 972 (Cal. 1951).

595. See *id.* at 970.

596. *Id.* at 971.

597. *Id.*

598. See *supra* text accompanying note 383.

599. See *Nickola v. Munro*, 328 P.2d 271, 275 (Cal. Dist. Ct. App. 1958); *Kershaw v. Department of Alcoholic Beverage Control*, 318 P.2d 494, 498 (Cal. Dist. Ct. App. 1957).

stitutional.⁶⁰⁰ An amicus brief prepared by Morris and Juliet Lowenthal, ACLU attorneys who specialized in homosexual bar cases, supported their position. The California Supreme Court unanimously invalidated the 1955 amendment as inconsistent with *Stoumen*, but chose its words carefully. The court emphasized that the ABC Department did not rely on investigative reports of lewd conduct nor its revocation authority under the pre-1955 statutory prohibition of bars' being used as a "disorderly house or place . . . in which people abide or to which people resort for purposes which are injurious to the public morals."⁶⁰¹ The court all but endorsed the results in *Kershaw* and *Nickola*, albeit under authority of the pre-1955 law and not the 1955 amendment: "Conduct which may fall short of aggressive and uninhibited participation in fulfilling the sexual urges of homosexuals, reported in some instances [*Kershaw*], may nevertheless offend good morals and decency by displays in public which do no more than manifest such urges."⁶⁰² The court concluded with the suggestion that reports of "women dancing with other women, and women kissing other women" would have sustained a revocation consistent with *Stoumen*.⁶⁰³

Although it was the first decision to strike down an anti-homosexual statute as unconstitutional and was hailed by the homophile press and moderate homophobe press alike, *Vallerga* was not revolutionary.⁶⁰⁴ It was a compromise that established a closet on terms unfavorable to homosexuals: they had a theoretical right to congregate, but not if they touched or kissed one another, as that would be offensive to the hypothetical heterosexual. That the only offended heterosexuals likely to frequent these bars were undercover investigators revealed that *Vallerga* acquiesced in the threatening closet: same-sex dancing and kissing in a gay bar threatened the morals of a society that would never see it but through the eyes of its undercover investigators, who could quickly bust such an establishment. The California appellate courts got the message, upholding post-*Vallerga* license revocations of the 585 Club, the Paper Doll, and the Black Cat, based upon decoy cop testimony about kissing, dancing, and advances by homosexual patrons.⁶⁰⁵

600. *Vallerga v. Department of Alcoholic Beverage Control*, 347 P.2d 909, 910 (Cal. 1959).

601. CAL. BUS. & PROF. CODE § 25601 (West 1954). Violation of this prohibition subjected a bar to the loss of its liquor license. See *id.* § 24200(b).

602. *Vallerga*, 347 P.2d at 912.

603. *Id.* at 912-13.

604. See, e.g., Adah Aragon, Note, *Licensing Revocation: Premises of Liquor License as Meeting Place for Homosexuals Not Good Cause*, 7 UCLA L. REV. 804 (1960).

605. See *Stoumen v. Munro*, 33 Cal. Rptr. 305, 316 (Dist. Ct. App. 1963); *Morrell v. Department of Alcoholic Beverage Control*, 22 Cal. Rptr. 405, 414 (Dist. Ct. App. 1962); *Benedetti v. Department of Alcoholic Beverage Control*, 9 Cal. Rptr. 525, 528 (Dist. Ct.

B. Freedom of Expression and Press (Homophile Publications and Obscenity)

In 1942, the Supreme Court said that certain "classes of speech" find no protection in the First Amendment:

These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.⁶⁰⁶

There was little dispute about the decision among lawyers in the 1950s, but considerable uncertainty arose as to exactly what "obscene" speech was. Were the lesbian-friendly stories in *Vice-Versa* obscene? The postwar literature depicting homosexuals? News items in *The Ladder* or *One*? A lot of people believed that any mention of homosexuality without disapproval was legally obscene.

Two California decisions handed down in 1957 illustrated vastly different viewpoints. The plaintiff, *One*, sued for an order declaring its October 1954 issue mailable as nonobscene, and its appeal from an adverse trial judgment reached the federal court of appeals in 1957.⁶⁰⁷ Judge Ross applied a traditional obscenity test of "whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influence and into whose hands a publication of this sort may fall" by allowing or implanting in such minds obscene, lewd, or lascivious thoughts or desires.⁶⁰⁸ Under the traditional test, the court held that truly educational articles about homosexuality would be protected, but the three items cited by the Postmaster would not. The court noted that the three items were "nothing more than cheap pornography calculated to promote lesbianism," "dirty, vulgar and offensive to the moral senses," and "morally depraving and debasing."⁶⁰⁹

Judge Ross's standard for obscenity had greatest support in the older case law. However, more recent case law, such as the New York federal court decisions disallowing Customs Service censorship of James Joyce's *Ulysses*, reflected another standard. The newer standard held that sexually open speech might serve discursive as well as prurient functions, and courts should overturn censorship when

App. 1960), overruled by *Kirby v. Alcoholic Beverages Control Appeals Bd.*, 87 Cal. Rptr. 908, 916 (Ct. App. 1970).

606. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (dictum).

607. See *One, Inc. v. Olesen*, 241 F.2d 772 (9th Cir. 1957), *rev'd per curiam*, 355 U.S. 371 (1958).

608. *Id.* at 775.

609. *Id.* 777-78 (referring to the short story *Sappho Remembered*, the poem *Lord Samuel* and *Lord Montagu*, and an advertisement for the magazine *The Circle*, respectively).

literature had any socially redeeming feature. Allen Ginsberg's *Howl* both tested and expressed this anti-conformist understanding of the First Amendment, for it elegized "the best minds of my generation by madness," those

who bit detectives in the neck and shrieked with delight in
 policecars for committing no crime but their own wild
 cooking pederasty and intoxication,
 who howled on their knees in the subway and were dragged off
 the roof waving genitals and manuscripts,
 who let themselves be fucked in the ass by saintly
 motorcyclists, and screamed with joy,
 who blew and were blown by those human seraphim, the
 sailors, caresses of Atlantic and Caribbean love,
 who balled in the morning in the evenings in rosegardens and
 the grass of public parks and cemeteries scattering
 their semen freely to whomever come who may.⁶¹⁰

The newer standard was liberally applied by Judge Clayton Horn of the San Francisco Municipal Court when he evaluated the charges against Lawrence Ferlinghetti for selling *Howl*. As to the state's charge that *Howl* used "filthy, vulgar, obscene, and disgusting language," Judge Horn replied:

The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. . . .

The theme of "Howl" presents "unorthodox and controversial ideas." Coarse and vulgar language is used in treatment and sex acts are mentioned, but unless the book is entirely lacking in "Social importance" it cannot be held obscene.

. . . The People state that it is not necessary to use [vulgar] words and that others would be more palatable to good taste. The answer is that life is not encased in one formula whereby everyone acts the same or conforms to a particular pattern. No two persons think alike; we were all made from the same mold but in different patterns. Would there be any freedom of press or speech if one must reduce his vocabulary to vapid innocuous euphemism? An author should be real in expressing his thoughts and ideas in his own words. . . .⁶¹¹

Finding that *Howl* was indeed "real" in this way, Judge Horn acquitted Ferlinghetti.

Later that year, in *Roth v. United States*,⁶¹² the Supreme Court spoke for the first time on the relationship between obscenity and

610. GINSBERG, *supra* note 335, at 3-4.

611. *People v. Ferlinghetti*, Decision of October 3, 1957, reprinted in GINSBERG, *supra* note 335, at 173-74.

612. 354 U.S. 476 (1957).

the First Amendment. The Court held that obscenity was not speech under the First Amendment, but limited obscenity to "material which deals with sex in a manner appealing to prurient interest," that is, "material having a tendency to excite lustful thoughts."⁶¹³ Justice William Brennan's *Roth* opinion seemed to fall between Judge Ross' broad view of obscenity in *One* and Judge Horn's broad view of the First Amendment in *Ferlinghetti*. Indeed, he explicitly endorsed the centrist approach expressed by the ALI's draft Model Penal Code. The ALI posited that a work was obscene "if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters."⁶¹⁴ Under such a vague standard, reasonable people might differ as to the obscenity of *Howl* or *Sappho Revisited*.

Notwithstanding the many ambiguities of *Roth*, the Supreme Court took a stronger stand on issues of homosexual expression. In January 1958, the Court, in a one-sentence unsigned opinion, reversed the Ninth Circuit's *One* disposition.⁶¹⁵ The Court's citation of *Roth*⁶¹⁶ suggested that the Court was open to the view that discussion of homosexuality and same-sex intimacy was not itself an appeal to "prurient" interests. In another application of *Roth*, the Court, in *Kingsley International Pictures Corp. v. Regents*,⁶¹⁷ struck down New York's film licensing law banning movies presenting acts of "sexual immorality, perversion, or lewdness . . . as desirable, acceptable, or proper forms of behavior."⁶¹⁸ Because the law targeted movies for advocating specific ideas (adultery in *Kingsley*), it violated the First Amendment's core guarantee. In *Manual Enterprises, Inc. v. Day*,⁶¹⁹ the Court held that the Post Office could not refuse mail services for male physique magazines.⁶²⁰ The plurality opinion by Justice Harlan assumed that such magazines had a "prurient" appeal to male homosexuals, but held them nonobscene because pictures of semi-nude male physiques were not "patently offensive" to community standards.⁶²¹

613. *Id.* at 487-88 n.2.

614. MODEL PENAL CODE § 207.10(2) (Tentative Draft No. 6, 1957).

615. *See One, Inc. v. Olesen*, 355 U.S. 371, 371 (1958) (per curiam).

616. *See id.*

617. 380 U.S. 684 (1959). The Court first applied the First Amendment to movies in *Burstyn v. Wilson*, 343 U.S. 495 (1952).

618. *Id.* (quoting N.Y. EDUC. LAW § 122-a (McKinney Supp. 1958)).

619. 370 U.S. 478 (1962).

620. *See id.* at 482.

621. *Id.* Justice Harlan's opinion was joined by Justice Stewart. *See id.* at 479. Three Justices (Brennan, Warren, Douglas) concurred in the judgment on the ground that the Post Office did not have authority to ban mail. *See id.* at 518-19 (Brennan, J. concurring).

One, Kingsley, and Manual Enterprises suggested that homosexual literature, film, and erotica were protected by the First Amendment. Unfortunately, lower federal and state courts did not read the precedents in a pro-homosexual manner. The New York Court of Appeals said that "[d]epicting dirt for dirt's sake, the obscene is the vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness"⁶²² The U.S. Court of Appeals for the Seventh Circuit upheld the Comstock Act convictions of Nirvana and Jack Zuideveld for sponsoring a correspondence club, "The Adonis Male Club," among the subscribers to their male physique magazines, *Vim* and *Gym*.⁶²³ Although the magazines were not obscene under *Manual Enterprises*, the Zuidevelts were charged with conspiracy to circulate "vile," obscene letters,⁶²⁴ which many of the Adonis Club letters concededly were. The conviction seems to have been based mainly upon the Zuidevelts' knowledge that their subscribers were male homosexuals.

Roth and the Supreme Court's subsequent obscenity decisions tangibly contributed to the explosion of lesbian and gay subcultures, and to their inclusion within American culture. The *One* and *Manual Enterprises* decisions largely insulated informational publications, male physique magazines, and almost all of the lesbian pulp romances from state regulation. The same year that *Roth* was handed down, Ann Bannon's *Odd Girl Out* was published. Bannon became the most successful lesbian romance author and her success encouraged other authors and publishers to enter this lucrative market. Although not considered well-written literature today, the 1950s lesbian romances were the first positive expression of same-sex desire most women could find before 1969. Unlike Radclyffe Hall's depressing *Well of Loneliness*, most of the romances written by Bannon and other leading authors had happier endings. In short, this literature affirmed that lesbians were human beings who could enjoy happy, productive, middle-class lives. Other work validated in the face of censorship included great literature such as James Baldwin's exploration of a gay-threatening closet in *Giovanni's Room*.

More importantly, the Supreme Court decisions substantially raised the cost of censorship. Gone were the days when Customs Service officials, Post Office personnel, and state boards could simply decree what would be available to citizens. These proceedings were

Justice Black concurred in the result without opinion. See *id.* at 495. Justice Frankfurter did not participate. See *id.* Justice Clark dissented. See *id.* at 519 (Clark, J., dissenting).

622. *People v. Richmond County News*, 175 N.E.2d 681, 686 (N.Y. 1961). A similar approach was applied to censor magazines displaying nude males. See *People v. G.I. Distributors, Inc.*, 228 N.E.2d 787, 789 (N.Y. 1967).

623. See *United States v. Zuideveld*, 316 F.2d 873, 875-76, 881 (7th Cir. 1963).

624. *Id.* at 877.

expensive for the porn purveyors as well, but the Supreme Court provided procedural advantages that made lesbian and gay erotica widely available.

Most of the state and municipal laws allowed censors or the police to seize the allegedly obscene materials, sometimes without notice such as through the Customs Service, and usually without a prior hearing of any kind. In *Marcus v. Search Warrant*,⁶²⁵ the Supreme Court held that the seizure of allegedly obscene materials based upon an ex parte petition to a magistrate was unconstitutional because it would have a chilling effect on the promulgation of materials protected by *Roth*.⁶²⁶ In *Bantam Books, Inc. v. Sullivan*,⁶²⁷ the court more broadly prohibited even informal "prior restraints" by state actors against allegedly obscene materials.⁶²⁸ The Court extended *Bantam's* strong presumption against prior restraints to protect allegedly obscene movies in *Freedman v. Maryland*.⁶²⁹ Films had not been protected by the First Amendment until the 1950s, and *Freedman* clinched the proposition that film was an expressive medium similar to newspapers and novels.

Censorship is a sieve-like process under the best of circumstances, and the Supreme Court's ever-changing, and generally stricter, requirements for censorship made it virtually nonexistent after 1961. Lesbian romances and male physique magazines continued to flourish, and were joined in the 1960s by a wider array of informational newsletters and magazines, openly gay erotica, and even gay characters in films. The relaxation of the Motion Picture Production Code to allow mention of homosexuality in 1961, and the Code's subsequent collapse, was surely abetted by the Supreme Court's application of free-speech precepts to film in *Kingsley*. Although American motion pictures continued to depict homosexuals in grotesquely stereotypical terms, European films presented gay characters more naturally. These films were subject to much less censorship in the 1960s and, by the 1970s, virtually none at all. More importantly, *Roth* confirmed that radio and, later, television were free to air programs discussing homosexuality "so long as the program is handled in good taste," according to the Federal Communications Commission.⁶³⁰ In short, gay characters and themes became part of American public culture, in part because of First Amendment jurisprudence.

625. 367 U.S. 717 (1961).

626. See *id.* at 738.

627. 372 U.S. 58 (1963).

628. See *id.* at 70.

629. 380 U.S. 51, 57 (U.S. 1965).

630. *FCC v. Pacifica Found.*, 36 F.C.C. 147, 149 (1964) (rejecting challenges to KPFA's broadcast of *Live and Let Live*, the first nationally broadcast program in which gay people spoke for themselves).

C. Equal Treatment (*The New Wave of Employment Cases*)

Dr. Franklin Kameny had been cashiered in 1957 as a result of an arrest for lewdness the year before.⁶³¹ He not only lost his government job, but also any prospect of employment in the private sector because he could not obtain a security clearance. Shocked and then angered, Kameny sued. Initially, his challenge deemphasized homosexuality and stressed neutral criteria and asserted procedural violations; these arguments did not prevail. Kameny wrote his own petition for review by the Supreme Court and introduced egalitarian arguments similar to those of Cory's *The Homosexual in America*.⁶³² The civil service's action and allied federal policies reduced homosexuals like himself to second-class citizenship, Kameny argued. Discrimination based upon homosexual orientation was "no less illegal than discrimination based on religious or racial grounds."⁶³³ The Supreme Court denied the petition without comment,⁶³⁴ and Kameny founded the Mattachine Society of Washington (MSW) shortly thereafter.⁶³⁵

The central goal of the Mattachine Society was to end federal employment discrimination in the civil service, in security clearances, and in the armed forces.⁶³⁶ The stated goals of the group were

to secure for homosexuals the basic rights and liberties established by the word and spirit of the Constitution of the United States, [t]o equalize the status and position of the homosexual with those of the heterosexual by achieving equality under law, equality of opportunity, equality in the society of his fellow men, and by eliminating adverse prejudice, both private and official, [and] [t]o secure for the homosexual the right, as a human being, to develop and achieve his full potential and dignity, and the right, as a citizen, to make his maximum contribution to the society in which he lives.⁶³⁷

This statement represented an intellectual turning point in the history of the closet: homosexuals insisted upon equality as uncloseted citizens, not just the liberty of the protective closet. Indeed, the new generation of leaders saw the libertarian closet of the ALI and its moderate homophobes as a threatening closet, cutting off homosexuals from one another and from equal citizenship.

MSW's main practical agenda was to confront harassment of homosexuals by the federal and district governments. At the August 1961 organizational meeting, Kameny was alerted that one of the

631. See *Kameny v. Brucker*, 282 F.2d 823, 823-24 (D.C. Cir. 1960) (per curiam).

632. See Johnson, *supra* note 2, at 55-56.

633. *Id.* at 55.

634. See *Kameny v. Brucker*, 365 U.S. 843, 843 (1961).

635. See Johnson, *supra* note 2, at 56.

636. See *id.* at 58-62.

637. CONSTITUTION OF THE MATTACHINE SOCIETY OF WASHINGTON art. II, § 1(a)-(c).

sixteen men present was Lieutenant Louis Fochet of the District's morals squad. Kameny announced, "I understand that there is a member of the Metropolitan Police Department here. Could he please identify himself and tell us why he's here?"⁶³⁸ Thus outed by an out-of-the-closet homosexual, Fochet skulked away.⁶³⁹ Kameny and MSW followed the same unashamed approach in dealing with all branches of government, including the White House and the FBI, both of which were on the society's mailing list.⁶⁴⁰ In June 1962, Kameny wrote Attorney General Robert Kennedy, introducing himself and the society:

We feel that, for the 15,000,000 American homosexuals, we are in much the same position as the NAACP is in for the Negro, except for the minor difference that the Negro is fighting official prejudice and discrimination at the state and local level, whereas we are fighting official prejudice and discriminatory policy and practice, as ill-founded, as unreasonable, as unrealistic, and as harmful to society and to the nation, at the Federal level [as well]. Both are fighting personal prejudice at all levels. For these reasons, and because we are trying to improve the position of a large group of citizens presently relegated to second-class citizenship in many respects, we should have, if anything, the assistance of the Federal government, and not its opposition.⁶⁴¹

In accord with the FBI's recommendation, the Attorney General declined to respond. In August 1962, MSW made similar points in a press release that it circulated to the media, members of Congress, and other government officials.⁶⁴² This new homosexual spirit was also taking charge of New York's Mattachine Society, whose leadership changed hands from the old to the new guard in 1964 with the election of Richard Leitsch as president. Likewise, the Society for Individual Rights (SIR), a San Francisco homophile group founded in 1964, began with the premise of "the worth of the homosexual . . . and [his] right to [his] own sexual orientation."⁶⁴³ SIR insisted upon equal rights protecting publicly gay people from discrimination and not just an apartheid of the closet protecting discreet gay people from invasion of their private spaces.⁶⁴⁴

638. Johnson, *supra* note 2, at 56.

639. *See id.*

640. *See id.* at 57.

641. Letter from Dr. Franklin E. Kameny, President, Mattachine Soc'y of Washington, to Robert F. Kennedy, U.S. Attorney General (June 28, 1962) (on file with author).

642. *See* Johnson, *supra* note 2, at 57. The release argued that a strong initiative be taken to obtain for the homosexual minority the same constitutional rights guaranteed to all citizens.

643. MARTIN S. WEINBERG & COLIN J. WILLIAMS, *MALE HOMOSEXUALS: THEIR PROBLEMS AND ADAPTATIONS* 51-53 (1974).

644. *See id.*

Combining egalitarian arguments with traditional libertarian ones, these organizations organized a series of lawsuits against the civil service exclusion. In the first of this new wave of lawsuits, MSW secretary Bruce Scott and his ACLU-allied lawyer won a landmark victory against the Civil Service Commission's exclusion of him because of "immoral conduct," namely, his disorderly conduct arrests in 1947 and 1951.⁶⁴⁵ Chief Judge David Bazelon voted to remand his case to the Commission because it had not given a sufficiently precise reason for the action: "The Commission must at least specify the conduct it finds 'immoral' and state why that conduct related to 'occupational competence or fitness,' especially since the Commission's action involved the gravest consequences."⁶⁴⁶ Scott was the first openly gay person to win a lawsuit against the federal civil service exclusions. More were to follow in the 1960s.

CONCLUSION: THE DISCOURSES OF PRIVACY AND EQUALITY

Privacy rights only become important once the Lockean state has evolved into the bureaucratic regulatory state. Same-sex intimacy was practically unregulated in the nineteenth century, and little regulated outside of New York City before World War I. Twentieth-century America grew increasingly interested in gender and sexual deviance, and by the 1950s had created a pervasive regulatory regime for it. The objects of that regime—lesbians, homosexual men, butch women, female impersonators, pedophiles, and sex perverts of all stripes—resisted it in the legal argot of their time, the emerging principle or policy of privacy, which boils down to a list of things the state cannot do to one. My account of gay-friendly privacy discourse reveals the familiar problem with privacy as a Millian concept, namely, the lack of criteria by which to distinguish the "private" from the "public," or acts that only affect the actor from those with third-party effects.⁶⁴⁷ I have added a more profound problem, from a gay point of view, namely, privacy's contribution to an unstable culture of the closet. By channeling energy into privacy rights, homo-

645. See *Scott v. Macy*, 349 F.2d 182, 185 (D.C. Cir. 1965).

646. *Id.* at 184. Chief Judge Bazelon wrote only for himself; there was no majority opinion. Concurring, Judge Carl McGowan voted to overturn the government's action "solely for what seem to me to be the inadequacies, in terms of procedural fairness, of the notice given to appellant of the specific elements constituting the 'immoral conduct' relied upon as disqualifying him for all federal employment." *Id.* at 185 (McGowan, J., concurring).

647. The Model Penal Code's resolution, for example, deregulated consensual sodomy in private but left public solicitation of same-sex sodomy criminal. So long as the solicitation is accomplished discreetly or to an apparently willing listener, it would seem to have no greater third-party effects in the normal run of cases. So long as the only offended observers of solicitation were decoys planted by the state, there would seem to be only trivial differences even from a locational (bedroom versus park) view of privacy, again in most cases.

philes slighted rights of equal citizenship and public expression that are also important. The right of privacy is the hermaphroditic parent of "don't ask, don't tell."⁶⁴⁸

There are many doctrinal as well as historiographical directions one can pursue from this idea. One is that it helps explain the obsessional effort by the Warren and Burger Courts to distance their rights of privacy from homosexuality. Although Justice Louis Brandeis was the first legal thinker to identify the right of privacy as a needed limit on the overzealous state and to explore its constitutional dimensions,⁶⁴⁹ Justice Harlan's dissenting opinion in *Poe v. Ullman*⁶⁵⁰ is properly thought to be the genesis of the modern right. Unlike Justice Brandeis's right to be left alone in one's home, Justice Harlan's right is to be left alone in one's bedroom. It is a thoroughly sexualized right, and one whose border is marked by the writer's opinion of what is unacceptable sexual deviance. Privacy in the 1950s meant sexual privacy and, like sexual secrecy, sexual privacy was most dramatically marked by same-sex intimacy.

Justice Harlan wrote against this background in 1961 and staked out his traditionalist position: the sexualized right of privacy is tied to marriage and distanced from "[a]dultery, homosexuality, and the like."⁶⁵¹ A Warren Court majority would repeat this rhetoric in *Griswold v. Connecticut*,⁶⁵² and the Burger Court would follow the idea with Justice White's opinion in *Bowers v. Hardwick*.⁶⁵³ Like traditionalists before them, Justices White and Harlan viewed a homosexual's right of privacy as a straight-threatening closet. Like libertarians before him, Justice Blackmun's *Hardwick* dissent viewed a homosexual's right of privacy as a mutually protective closet. A criticism of Justice Blackmun's nice dissent is that privacy and the closet

648. Privacy is hermaphroditic in that it is both mother and father of "don't ask, don't tell." The policy protects the privacy of gay people, who can be left alone by the state; it also protects the privacy of gay-fearing people, who can be left unbothered by gays. It is unstable, however, for the same reasons the closet was in 1961: closeted gay people are not protected from private discrimination and violence, and homophobic people are not protected from the knowledge that they are surrounded by homosexuals and cannot even tell whom to fear first.

649. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (articulating policy reasons to favor privacy rights); *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (constitutional protection against overzealous government rooted in rhetoric of privacy).

650. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

651. *Id.* at 553.

652. 381 U.S. 479 (1965). Justice Douglas' opinion for the Court emphasized the marital features of privacy to ensure that the married plaintiffs could use contraceptives during marital sex. See *id.* at 485-86. Justice Harlan repeated his *Poe* views. See *id.* at 499-502 (Harlan, J., concurring). Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, quoted and endorsed the "[a]dultery, homosexuality, and the like" language in his concurring opinion. *Id.* at 499 (Goldberg, J., concurring).

653. 478 U.S. 186 (1986) (upholding Georgia's consensual sodomy law, at least as applied to "homosexual sodomy").

do not take us far toward a society where gay people can participate freely in public culture as equal citizens. The critique of the closet and of privacy in this Article resonates well with Justice Anthony Kennedy's opinion for the Court in *Romer v. Evans*.⁶⁵⁴ Although Justice Antonin Scalia's dissenting opinion lambasted *Evans* for leaving *Hardwick* in a constitutional closet, the history in this Article suggests that this was fine. Gay rights has generally moved beyond privacy rhetoric to equality and free speech rhetoric, and the Court is entitled to do the same.

654. 116 S. Ct. 1620 (1996).

APPENDIX 1A
SODOMY ARRESTS IN THREE CITIES, 1930-1975^a

	WASHINGTON, D.C.	BALTIMORE	NEW YORK CITY
1930	2	28	108
1931	0	NA	116
1932	0	28	91
1933	NA	53	125
1934	0	31	137
1935	2	39	130
1936	1	35	182
1937	4	40	156
1938	9	61	186
1939	9	45	165
1940	6	47	158
1941	5	39	154
1942	5	62	163
1943	NA	55	136
1944	NA	42	157
1945	NA	69	117
1946	NA	50	98
1947	NA	27	117
1948	NA	52	148
1949	NA	78	116
1950	78 ^b	103	161
1951	59	73	180
1952	69	52	168
1953	73	97	165
1954	70	110	200
1955	36	172	223

a. The data in this Appendix are derived from the annual reports of the District of Columbia, Baltimore, and New York City police departments.

b. The Washington, D.C., figures from 1950 to 1975 are sodomy complaints, rather than arrests. Because as many as half of the sodomy arrests in major cities were the result of decoy cop operations and not citizen complaints, the figures for arrests are certainly higher.

	WASHINGTON, D.C.	BALTIMORE	NEW YORK CITY
1956	24	121	211
1957	41	131	487
1958	26	192	NA
1959	NA	72	NA
1960	54	159	NA
1961	56	87	NA
1962	106	98	NA
1963	60	77	NA
1964	58	81	NA
1965	37	NA	NA
1966	36	45 ^c	NA
1967	35	71	NA
1968	38	100	NA
1969	39	NA	NA
1970	41	NA	NA
1971	171	NA	NA
1972	137	NA	NA
1973	171	NA	NA
1974	163	NA	NA
1975	93	NA	NA

c. The Baltimore figures for 1966-68 are indictments brought by grand juries and hence understate the number of arrests.

APPENDIX 1B

DISTRICT OF COLUMBIA SODOMY COMPLAINTS, 1950-1975^d

	COMPLAINTS	SAME SEX (% OF TOTAL)	SAME SEX MINORS (% OF SAME-SEX TOTAL)
1950	78	65 (81%)	14 (22%)
1951	59	51 (87%)	34 (66%)
1952	69	58 (84%)	40 (69%)
1953	73	57 (78%)	38 (66%)
1954	70	64 (91%)	44 (69%)
1955	36	29 (81%)	22 (69%)
1956	24	24 (100%)	18 (75%)
1957	41	38 (93%)	22 (59%)
1958	26	19 (72%)	7 (37%)
1959	NA	NA	NA
1960	54	50 (93%)	23 (46%)
1961	56	54 (96%)	14 (26%)
1962	106	106 (100%)	40 (38%)
1963	60	55 (91%)	9 (16%)
1964	58	54 (92%)	14 (26%)
1965	37	35 (95%)	11 (32%)
1966	36	32 (89%)	6 (19%)
1967	35	27 (77%)	19 (70%)
1968	38	36 (95%)	29 (80%)
1969	39	34 (87%)	29 (86%)
1970	41	32 (78%)	1 (3%)
1971	171	145 (79%)	83 (57%)
1972	137	123 (82%)	69 (56%)
1973	171	135 (71%)	103 (77%)
1974	163	130 (80%)	75 (57%)
1975	93	72 (77%)	41 (57%)

d. The data in this Appendix are derived from the annual reports of the District of Columbia Police Department.

APPENDIX 1C

**"DEGENERATES" ARRAIGNED IN NEW YORK CITY'S MAGISTRATES'
COURTS, 1930-62^e**

	ARRAIGNMENTS (FEMALES)	% CONVICTIONS (OVERALL %)	% WORKHOUSE (OVERALL %)	% SENTENCED TO > 2 MOS. (OVERALL %)
1930	1212 (4)	85% (86%)	33% (4%)	17% (30%)
1931	437 (0)	80% (84%)	26% (2%)	10% (26%)
1932	465 (4)	79% (83%)	24% (2%)	17% (29%)
1933	1042 (NA)	NA	NA	NA
1934	456 (NA)	NA	NA	NA
1935	554 (82)	70% (83%)	28% (1%)	24% (30%)
1936	543 (100)	80% (85%)	34% (1%)	28% (21%)
1937	610 (39)	83% (86%)	33% (1%)	33% (22%)
1938	726 (67)	79% (87%)	39% (2%)	34% (17%)
1939	647 (41)	86% (90%)	44% (2%)	35% (17%)
1940	707 (69)	85% (88%)	44% (2%)	33% (15%)
1941	735 (61)	80% (81%)	36% (2%)	23% (13%)
1942	717 (NA)	79% (86%)	29% (3%)	27% (14%)
1943	855 (NA)	81% (82%)	32% (2%)	30% (11%)
1944	1072 (NA)	84% (84%)	30% (1%)	20% (13%)
1945	2147 (NA)	89% (84%)	28% (2%)	9% (10%)
1946	2473 (NA)	86% (89%)	27% (1%)	11% (12%)
1947	3105 (NA)	90% (81%)	20% (1%)	11% (10%)
1948	3289 (NA)	91% (80%)	20% (1%)	10% (9%)
1949	3227 (NA)	90% (91%)	18% (2%)	NA
1950	2285 (NA)	85% (90%)	30% (2%)	NA
1951	1532 (NA)	63% (89%)	87% (1%)	NA
1952	1330 (NA)	79% (92%)	33% (1%)	NA
1953	1054 (NA)	80% (92%)	33% (1%)	NA
1954	1307 (NA)	80% (93%)	28% (2%)	12% (8%)

e. The data in this Appendix are derived from the annual reports of the New York City Magistrates' Courts, *microformed on* *ZAN-10223 (N.Y. Pub. Libr.). The Fingerprint Bureau began keeping separate records for "degenerates" in 1916, but the magistrates did not create a separate category for "degenerates" until 1922. Before 1922, "degenerates" were included with others arraigned for "disorderly conduct."

	ARRAIGNMENTS (FEMALES)	% CONVICTIONS (OVERALL %)	% WORKHOUSE (OVERALL %)	% SENTENCED TO > 2 MOS. (OVERALL %)
1955	2148 (NA)	78% (92%)	32% (1%)	10% (7%)
1956	1887 (NA)	75% (92%)	39% (1%)	11% (6%)
1957	1862 (NA)	77% (91%)	33% (1%)	10% (7%)
1958	1197 (NA)	68% (89%)	32% (1%)	NA
1959	1000 (NA)	63% (89%)	33% (1%)	9% (3%)
1960	784 (NA)	67% (90%)	36% (1%)	10% (3%)
1961	839 (NA)	69% (91%)	32% (1%)	13% (3%)
1962	565 (NA)	68% (90%)	38% (1%)	15% (4%)

APPENDIX 2A

SEX CRIME STATUTES APPLICABLE TO SAN FRANCISCANS, 1950^f*Felonies*

CRIME	CALIFORNIA PENAL CODE	PENALTY
Unconsented Rape	§ 261	3 years to life
Aggravated Oral Copulation	§ 288a	3 years to life
Bestiality	§ 286	1 year to life
Sodomy (Anal Copulation)	§ 286	1 year to life
Lewd Act with a Child Under 14	§ 288	1 year to life
Molesting a Child Under 18	§ 647a	1 year to life
Indecent Exposure (2d Offense)	§ 311	1 year to life
Incest	§ 285	1-50 years
Statutory Rape (Girls Under 18)	§ 261(1)	1-50 years
Assault to Rape/Sodomy	§ 220	1-20 years
Oral Copulation	§ 288a	1-15 years
Abduction & Forced Marriage	§ 265	2-14 years
Pimping	1907 Gen. L.	1-10 years
Pandering	1906 Gen. L.	1-10 years
Abduction Against Will	§ 266a	1-5 years; \$1000
Abduction for Prostitution	§ 267	6 mos.-5 years; \$1000
Solicitation Rape by Force	§ 653 (f)	6 mos.-5 years; \$5000
Seduction	§§ 266, 268	6 mos.-5 years; \$5000
Conspiracy, Sex Misdemeanor	§ 182	up to 3 years, \$5000
Conspiracy, Sex Felony	§ 182	same as misdemeanor
Attempt to Commit Sex Crime	§ 664	½ penalty

Misdemeanors

CRIME	CALIFORNIA PENAL CODE	PENALTY
Contributing to the Sexual Delinquency of a Minor	§ 702 W&I	2 years, \$1000, or 5 years probation

f. The data in this Appendix are derived from CAL. DEP'T OF MENTAL HYGIENE, *supra* note 42, at 78-80.

CRIME	CALIFORNIA PENAL CODE	PENALTY
Adultery	§ 269 (a)	1 year, \$1000
Indecent Exposure (1st Offense or Inducing Another)	§ 311 (1)-(2)	6 mos., \$500
Indecent Exhibitions	§ 311 (3)-(6)	6mos., \$500
Lewd Vagrancy	§ 647 (5)	6 mos., \$500
Molesting a Child Under 18 (1st Offense)	§ 647 (a)	6 mos., \$500
Loitering About Public Place Attended by Schoolchildren	§ 647 (a) (2)	6 mos., \$500
Peeping Tom	§ 647 (12)	6 mos., \$500
Sexual Contact with a Corpse	§ 647 (5)	6 mos., \$500
Prostitution	§ 647 (10)	6 mos., \$500
Soliciting for Prostitution	§ 318	6 mos., \$500
Keeping House Prostitution	§§ 315, 316	6 mos., \$500
Keeping Minor in House of Prostitution	§ 309	6 mos., \$500
Lewd Acts in Presence of Children	§ 273g	6 mos., \$500
Mutual Masturbation (Adults)	§ 647 (5)	6 mos., \$500
Disturbing Peace by Offensive Sexual Conduct	§ 415	90 days, \$200
Using Minor in Indecent Exhibition	§ 1308 Labor	6 mos., \$250
Failure to Register as a Sex Criminal	§ 290	6 mos., \$500
Public Mating of Animals	§ 381 Agric	30 days, \$20

Offenses, San Francisco Municipal Police Code

OFFENSE	SECTION OF CODE
Lewd, Obscene Language Within Hearing of Others	§ 147
Mechanically Reproducing Obscene Language	§ 168
Exhibition of Indecent Pictures, Figures, etc.	§ 169
Possessing Indecent Pictures, etc., for Indecent Purposes	§ 170
Being Witness to Indecent Performance	§ 170
Dramatization with Subject of Sex Degeneracy/Perversion	§ 176
Exhibiting, Participation in Lewd Play, Representation	§ 177
Displaying Lewd and Indecent Advertising	§ 182
Displaying Lewd or Indecent Posters	§§ 183, 193

OFFENSE	SECTION OF CODE
Displaying Representations of Sex Organs	§ 199
Using Obscene Language in Telephone Conversations	§ 210
Engaging in Lewd and Indecent Acts	§ 215
Being Inmate or Visitor to House of Prostitution	§ 220
Soliciting Prostitution	§ 225
Engaging in Business in House of Prostitution	§ 231
Using a Building for Prostitution	§ 236
Offering or Agreeing to Prostitution, etc.	§ 240
Indecent Motion Pictures	§ 741
Lewd Theatrical Performances	§ 759

APPENDIX 2B
SEX OFFENSE ARRESTS IN SAN FRANCISCO, 1945-1950 & 1958-1964^g

	1945-46	1947-48	1949-50	1958-59	1959-60	1960-61	1961-62	1962-63	1963-64
Total Arrests	4556	4418	3707	—	—	—	—	—	—
Adult Males	1698	1793	1663	—	—	—	—	—	—
Prostitution	583	712	507	—	—	—	—	—	—
Lewd Conduct	353	546	522	—	—	—	—	—	—
Rape	150	220	212	58	65	49	63	90	87
Contributing Minor Delinquency	186	165	158	—	—	—	—	—	—
Crime Against Child	66	53	85	—	—	—	—	68	72
Fellatio & Sodomy	48	54	35	28	37	118	121	71	97
All Others	42	43	144	—	—	—	—	—	—
Adult Females	2768	2528	1982	—	—	—	—	—	—
Prostitution	2634	2473	1927	—	—	—	—	—	—
All Others	134	55	55	—	—	—	—	—	—
Juveniles	90	97	62	—	—	—	—	—	—

g. The data in this Appendix for 1945-1950 are derived from the annual reports of the San Francisco Police Department, while the data for 1958-1964 are derived from the reports of the San Francisco District Attorney. The figures for 1958-1964 are fragmentary.

APPENDIX 2C

SELECTED SEX OFFENSE ARRESTS IN LOS ANGELES, 1940 & 1948^h

	1940			1948		
	ARRESTS (FEMALES)	CHARGES FILED	CONVIC- TIONS	ARRESTS (FEMALES)	CHARGES FILED	CONVIC- TIONS
Rape	263(2)	179	106	514(1)	219	145
Crime Against a Child	154(1)	75	25	281(2)	85	68
Indecent Exposure	112(1)	113	90	137(4)	180	131
Obscene Writing/ Pictures	19(5)	18	10	33(7)	33	27
Sex Perversion	21(1)	18	9	397(11)	16	9
Sodomy	19(0)	7	4	86(0)	0	1
Lewd Vagrancy	166(50)	215	186	1555(142)	1908	1711

h. The data in this Appendix are derived from the annual reports of the Los Angeles Police Department.

APPENDIX 3

FEDERAL DEPARTMENT SEX PERVERSION CASES, 1947-1950ⁱ

DEPARTMENT	CASES OF SEX PERVERSION	RESIGNED OR DISMISSED	CLEARED
Agriculture	32	31	0
Atomic Energy Comm'n	8	5	0
Civil Service Comm'n	18	18	0
Commerce	49	41	4
Economic Coop. Admin.	27	19	6
Federal Security Agency	22	13	5
General Accounting Off.	13	12	0
General Services Admin.	19	8	2
Housing & Home Finance	10	8	2
Interior	31	16	10
Justice	7	5	1
Labor	6	5	0
Library of Congress	15	10	0
Post Office	8	5	0
State Department	143	121	10
Treasury	23	20	0
Veterans Admin.	101	48	43
Other Departments	42	25	2
Totals	574	420	85

i. The data in this Appendix are derived from *EMPLOYMENT OF HOMOSEXUALS IN GOVERNMENT*, *supra* note 197, at 25. The Investigation Subcommittee's report has a separate category for cases pending in 1950, which this Appendix does not replicate.

APPENDIX 4

STATE SEXUAL PSYCHOPATH STATUTES, 1935-1960^j

This Appendix identifies state laws that sought to identify "sexual psychopaths," people afflicted with "psychopathic personality," "sexually or defective delinquent" persons, "psychopathic offenders" and to incarcerate them so that they could be treated by state psychiatrists.

CODE REFERENCE	DATE ENACTED (AMENDMENTS)	JURISDICTIONAL BASIS
ALA. CODE tit. 15, §§ 434-442	1951	Conviction of sex offense
CALIF. WELFARE & INST. CODE §§ 5500-5522, 5600- 5607	1939 (1945, 1949, 1950, 1951, 1952)	Conviction of any criminal of- fense with child under 14 or peti- tion filed in court
COLO. REV. STAT. §§ 39-19-1 to -10	1953	Conviction of specified sex offenses, including assault with intent to commit unnatural acts
D.C. CODE §§ 22-3501 to -3511	1948	Petition filed in court
FLA. STAT. § 917.12	1951 (1953, 1955, 1957)	Charge or conviction of specified crimes involving minors, including sodomy, lewdness, and attempts to commit those crimes
ILL. STAT. ch. 38, §§ 820-825g	1937 (1947)	Charge of any crime
IND. CODE §§ 9-3401 to -3412	1949	Charge or conviction of any but a few specified crimes
IOWA CODE §§ 225A.1 to 225A.15	1955 (1959)	Charge of public offense
KAN. STAT. ANN. §§ 62-1534 to -1537	1953	Conviction of a crime against public morals, including perversion
MASS. GEN. LAWS ch. 123A, §§ 1-11	1947	Conviction of specified sex offenses
MICH. STAT. ANN. § 28.967(1)-(9)	1937 (1939, 1950, 1952)	Charge or conviction of criminal offense
MINN. STAT. §§ 526.09-.11	1939, (1945, 1953)	Petition to the court
MO. REV. STAT. §§ 202.700- .770	1949	Criminal charge

j. The data in this Appendix are derived from Swanson, *supra* note 43, at 228-35.

CODE REFERENCE	DATE ENACTED (AMENDMENTS)	JURISDICTIONAL BASIS
NEB. REV. STAT. §§ 29.2901-.2907	1949 (1951)	Petition to the court
N.H. STAT. §§ 173:1 to :16	1949 (1953)	Charge of specified sex offenses (including sodomy, unnatural acts, or attempts) or petition to the court
N.J. REV. STAT. §§ 2:192-1.13 to -1.23	1949 (1950, 1951)	Conviction of specified and sex crimes, including sodomy, lewdness, indecent exposure, or attempts to commit such crimes
N.Y. PENAL LAW §§ 243, 483-a, 483-b, 1944-a, 2010	1950	Conviction of specified sex crimes, including first- and second-degree sodomy
OHIO REV. CODE ANN. §§ 2947.24-.29	1947 (1950)	Conviction of specified felonies or of misdemeanor involving sex offense or "abnormal tendencies"
OR. REV. STAT. §§ 137.111-.117	1953	Conviction of sex offenses involving child under 15
PA. STAT. ANN. tit. 19, §§ 1166-1174	1951	Conviction of certain sex offenses, including sodomy, assault with intent to commit sodomy
S.D. CODIFIED LAWS § 13.1727	1950	Conviction of molestation of a minor
TENN. CODE ANN. §§ 33-1301 to -1305	1957	Conviction of any sex crime
UTAH CODE ANN. §§ 77-49-1 to -8	1951 (1953)	Conviction of sex offense
VT. STAT. ANN. tit. 18, §§ 2811-2816	1943 (1945, 1951)	Conviction of any felony or third conviction of a misdemeanor
VA. CODE ANN. §§ 53-278.2 to -278.4	1950	Conviction of crime indicating sexual abnormality
WASH. REV. CODE §§ 71.06.010 to .260	1947 (1951)	Charged with or convicted of a specified sex offense, including sodomy, indecent exposure, indecent liberty with child, lewd vagrancy
WIS. STAT. § 959.15	1947 (1951)	Conviction of any crime
WYO. STAT. ANN. §§ 7-348 to -362	1951	Conviction of certain sex crimes, including sodomy, liberties with child, indecent exposure (third)

APPENDIX 5

MIAMI SEX CRIME ORDINANCES, 1945-1958

MIAMI CODE OF 1945

It unlawful to be a "disorderly person," defined to include "any person who shall be drunk or intoxicated or engaged in any indecent or obscene conduct in any public place; any vagrant; any person found begging in a public place; any person found loitering in a house of ill fame or prostitution or place where prostitution or lewdness is practiced, encouraged or allowed . . ."

MIAMI ORDINANCE 4655 (1951)

It shall be unlawful for any person to permit participation by any person or for any person to participate in any scene, act or play in which obscene language is used or obscene conduct is engaged in.

It shall be unlawful for any person to permit a female person to appear, or for any female person to participate and appear, in any scene, sketch, act or play, fully or partly clothed, and to gradually disrobe by discarding clothing or attire so that the breasts or lower part of the torso beginning at the hip line and buttocks are uncovered, or so thinly covered by mesh, transparent net, lawn, skin-tight materials which are flesh colored and worn skin-tight, so as to appear uncovered.

MIAMI ORDINANCE 4586 (1952)

No person shall permit the participation of any male person or group of male persons as female impersonators in any show or act within the limits of the city and no male person shall exhibit himself as a female impersonator in any show or act within the limits of the city. This section shall not apply to theatrical performances sponsored by accredited schools, colleges and universities, public parades, or any play or movie in a licensed legitimate theatre that is in no way lewd, indecent or immoral, in which members of the cast are males impersonating females.

MIAMI ORDINANCE 5135 (1954)

It shall be unlawful for an owner, manager, operator or employee of a business licensed to sell intoxicating beverages to knowingly employ in such business a homosexual person, lesbian or pervert as the same are commonly accepted and understood. It shall likewise be unlawful for an owner, operator, manager or employee of a business licensed to sell intoxicating beverages to knowingly sell to, serve to or allow consumption of alcoholic beverages by a homosexual person, lesbian or pervert, as the same are commonly accepted and understood, or to knowingly allow two or more persons who are homosexuals, lesbians or perverts to congregate or remain in his place of business.

MIAMI ORDINANCE 5521 (1956)

It is unlawful for a person in any place, whether publicly or privately owned, in the city to be found in a state of nudity or in a dress not customarily worn by his or her sex, or exposing his or her sexual organ, or committing any indecent or lewd act so as to be seen by another person from or in any place frequented by the public

MIAMI ORDINANCE 5271 (1955)

It is unlawful "for any person to make any indecent, lascivious or lewd proposals to any other person."

MIAMI ORDINANCE 5324 (1955) (AMENDED 1956)

A person is guilty of "disorderly conduct" who

. . . .

2. Is idle, dissolute or found begging.

3. Is found in a house of ill fame, gambling house disorderly house.

. . . .

5. Is found standing, loitering or strolling about in any place in the city, and not being able to give a satisfactory account of himself, or who is without any lawful means of support.

. . . .

7. Uses obscene or profane language in the presence of anyone else, or any indecent, insulting or abusive language to another, or makes any threats of violence against another person.

APPENDIX 6

MINUTES OF THE ADVISORY COMMITTEE TO THE FLORIDA
INVESTIGATIVE COMMITTEE, JUNE 29-30, 1964^k

John E. Evans, staff director of the Florida Legislative Investigation Committee, called the Advisory Committee meeting to order at 2:05 P.M. Present and participating were:

Mr. J. Duane Barker
Mrs. Charlotte Blee
Dr. Julian Davis
Mr. John E. Evans
Dr. Alan Gessner
Dr. Jack Kapchan
Judge Julian Laramore
Judge John Rudd
Mrs. Betty Sparks
Dr. Walter Stokes
S.A. Berwin Williams
Judge Lamar Winegart, Jr.

Mr. Crockett Farnell participated in the Monday afternoon and Tuesday noon and afternoon sessions.

Mr. Evans introduced Detective Morris Meek of the Pinellas County Sheriff's Office. Detective Meek reviewed the Sheriff's Office raid of a gay bar in Madeira Beach. Several undercover men had observed the activities of the customers, and were propositioned. There were almost 50 persons arrested, all charged with disorderly conduct. Confiscated was a national directory of gay bars entitled "The Lavender Baedeker," which was distributed for the perusal of the Committee.

Detective Meek reported that the vast majority of these people were from out of the state, with just a few from Tampa and the immediately surrounding area.

The disorderly house statute, under which this case is being prosecuted, is a new tool to combat public places which openly permit homosexual conduct, Meek said. He answered questions from the Committee on both the law under which the Department operated and on the views of the officers toward the operation of such places.

Dr. Gessner noted that in a situation where there are several gay bars which have mainly homosexuals in attendance, if as long as they limit themselves to these bars and are not soliciting in other locations, wouldn't it perhaps be a disservice to the community in

k. This document is available at Fla. Dep't of State, Div. of Archives, ser. 1486, carton 1, folder 15, Tallahassee, Fla.

breaking up these gay bars, rather than leaving the homosexuals to themselves in certain known bars.

Judge Winegart stated that he doubted this would actually segregate homosexuals from straight people; that this would only serve as a rallying point for the homosexuals.

Mr. Evans briefly summarized the tentative goals of the advisory group, stating that perhaps at this meeting the group could propose some basic legislation and have specific measures drafted as an initial recommendation; that after this was done, the Statutory Revision Section of the Attorney General's Office will examine the proposal. He suggested the group not concern itself with the political strategy for the passage of the recommended legislation, but rather with a consideration of the specifics of a sound law. If there is basic disagreement, majority and minority reports submitted on controversial issues will be appropriate.

Dr. Stokes reviewed correspondence with Dr. Charles Bowman, Professor of Law at the University of Illinois and leader of the movement which resulted in revision of the Illinois Criminal Code. Professor Bowman's letter gave a considerable insight into the mechanics which were involved in the development and adoption of the Illinois Code pertaining to sex offenses and sexual conduct.

A short discussion ensued concerning the extent of involvement, if any, of this committee with abortion laws and laws regarding the use of contraceptives. Judge Winegart read a portion of the Investigation Committee's mandate, and it was generally agreed that these problems would not be within the purview of the Committee.

Dr. Stokes suggested: (1) The adoption of a code eliminating the wording "crimes against nature" and substituting the concept of deviate sexual conduct as defined by the Illinois law to make the language more specific. (2) The elimination of crimes committed with animals. (3) The exclusion of specific prohibitions against sexual relations between mutually consenting adults in private — either heterosexual or homosexual.

Judge Winegart suggested that the group should first know how the Division of Mental Health is planning to revise Chapter 801, the Child Molester Law, before starting revision of that particular law. A copy of the current Chapter 801, Florida Statutes, and proposal drafted by the Legislative Council's Committee on Mental Health and Mental Retardation of Chapter 917.12, Criminal Sexual Psychopaths, was distributed to each member for examination.

Mr. Evans asked if there were any objections to changing the wording "crimes against nature" to "deviate sexual conduct," eliminating restrictions on sexual relations between mutually consenting adults and on humans and animals, as suggested by Dr. Stokes.

Judge Winegart stressed that he saw no objection to the words "crime against nature" and he felt this phrase contained very good, descriptive words. Further that "crime against nature" was merely the title of the offense; and under this heading in the bill, the offenses are set out more specifically.

After some little discussion of terminology, Mr. Evans suggested the group divide into two units, one composed of law enforcement and judicial representatives (Barker, Laramore, Winniams, Winegart and Rudd), and the other of the psychiatrists and psychologists (Davis, Gessner, Kapchan and Stokes) to evaluate and summarize their positions. Mrs. Blee requested that she not be appointed to either group so as to remain nonpartisan. There was no opposition to this suggestion. Mr. Evans asked that the two groups use as a starting point the five recommendations of the Investigation Committee set forth on the last page of the text in its report on homosexuality.

There was no objection to this arrangement, and the Committee split into their respective groups at approximately 4 P.M.

The Advisory Committee reconvened at 5:10 P.M. Dr. Stokes reported the recommendation of his group, which he later reduced to a written report attached hereto.

1. The general concept of the psychiatric examination proposal was acceptable, but to be change to read: "Mandatory psychiatric examination shall be conducted prior to sentencing in accordance with the provisions of 801.04 and/or 917.12 (as amended) of every person convicted of deviant sex conduct with a minor and discretionary presentence examination of others."

2. The second point, providing for outpatient psychiatric treatment centers, was approved.

3. The group also concurred with the Investigation Committee's recommendation for provision of the confidentiality of information relating to the first arrest for "deviant sexual conduct."

4. The creation of a central records repository for information on homosexuals arrested and convicted in Florida was not acceptable.

5. The group would approve the fifth point if amended to read: "Placing sole jurisdiction of a second deviant sexual conduct offense in a felony court and provide appropriate penalties upon conviction."

Dr. Stokes commented that they could not accept the "crimes against nature" phrase, but would substitute "sexual deviant conduct;" that they would propose the provision of no penalty for sexual relations between mutually consenting adults in private. He stated that it was their contention that any time deviant sexual conduct was performed in public, then the individuals would be in violation of the public indecency statute. Also proposed was the omission of any statutes dealing with the animal-human sex relations.

Judge Winegart reported the conclusions of his group.

1. The subcommittee felt this should be broadened to provide for a mandatory examination for *all* offenders falling within its definition and should contain a provision making commitment to an institution for treatment mandatory on receipt of a positive report of mental illness from the examining team.

2. The group concurred with the provision for outpatient psychiatric treatment centers to which offenders on probation or parole be assigned, with this treatment to be a condition of the parole or probation.

3. The provision of confidentiality in the arrests and convictions of homosexuals was not endorsed. Judge Winegart explained that the confidentiality of matters which concern the public creates public distrust, and the juvenile courts are under attack for this constantly.

4. His group favored the adoption of a central records repository as set forth in the Investigation Committee's report, but would recommend that this proposal be broadened to include all political subdivisions of the State, and that all these employees be photographed and fingerprinted for the suggested records repository.

5. The proposal of a second homosexual offense being considered a felony was favorable to the group.

Judge Winegart reported that the group would recommend the following:

1. That the statutes retain the wording, "crimes against nature," and the specific crimes denoted by this heading be identified as follows:

A. Any act providing or tending to provide sexual gratification performed with any beast.

B. Any act providing or tending to provide sexual gratification between two persons of the same sex.

C. Any act providing sexual gratification or tending to provide sexual gratification, between male and female involving the sex organs of one and the mouth or anus of another.

2. That the definition of incest be amended to include stepchild-steparent relationships.

3. That Chapter 801, the Child Molester Law, omit the age limit of 14 years, and amend it to apply to a child as defined by Florida Statutes, which is under 17 years of age; and that the penalty be changed to not less than 10 years or more than 20 years.

Judge Winegart, in speaking of the controversy concerning the "crime against nature" phrase, stated that the law has to give the law enforcement and judicial branches something specific to guide them when making arrests and passing judgments on offenders; that, as a practical matter, if a couple engaged in sexual relations are actually in the privacy of their room, then they never come to the

attention of law enforcement officials anyway, but this law needs to be included in the statutes to give law enforcement officials and the judiciary "teeth" with which to work.

Dr. Kapchan said that he believed that the moral fiber was destroyed when laws are drafted that cannot be enforced; and, further, that these acts should not be considered a criminal offense.

Dr. Gessner compared the similarities between a man becoming inebriated in his own private home and committing sex acts in his private home.

Judge Rudd stressed that to ignore consenting adults in private would certainly be to condone their actions and before long the problem would be out of control.

Judge Winegart remarked that he did not feel the homosexuals would start and stop their relationships with a certain birthdate of their prospects.

Brief discussion followed concerning the questionable public acceptance, by newspapers and citizens, of the proposal of mutually consenting adults; the ages of homosexual personality characteristics developed in children; and the ratio of male adults who have ever had homosexual contacts with the practicing male homosexuals today.

Mr. Evans asked the Committee if it was in general agreement to combine all the sex offense laws into one statute or code. There were no objections. Its was also agreed that it should be named "Sexual Deviation Code."

At this point, the Committee adjourned for dinner.

At 8:30 P.M. The meeting reconvened. Mr. Evans exhibited the circular advertising the Investigation Committee's report on homosexuality to the group, and read background information on H. Lynn Womack, who distributes the booklet through Guild Book Service of Washington, D. C.

A general discussion followed concerning the general characteristic traits of homosexuals and the proposal of allowing mutually consenting adults in private to do as they wished.

Dr. Stokes said that the homosexual who engages in homosexual activities exclusively with other homosexuals in private presents no harm or danger to society, and that ordinarily it is not their compulsion to cruise and try to involve children; that the child molester is in another group.

Mr. Barker emphasized that he could not believe that homosexuals stay completely within their own group; that perhaps a great number of them do, but that he was concerned with the others who did not limit themselves and did go out looking for children.

Mr. Barker further stated that in California if a man went into a public restroom, closed the door, and had a sex act with another man

in the adjacent stall, there was no charge he could be arrested on because the toilet would be considered private and this would be an invasion of his privacy.

There was discussion concerning the adjustment hardship found in homes where one partner was a homosexual and could not change; the rates of divorce in these situations; and the effect such circumstances had upon the children of the family.

Judge Rudd noted that in Federal government jobs, a homosexual was considered to be a security risk and a person could lose his job if it was found out that he was such. He said that a great percentage of defectors from our country were homosexuals.

Dr. Kapchan questioned the validity of homosexuals actually being security risks, and whether or not they actually were infiltrated into the State Department.

Judge Rudd said he had noticed in *One* magazine, the homosexual publication, that one of their recommendations was the legislation of mutually consenting adults and that we ought to be able to see that this is what they want — so the field will be wide open to them.

At 9:40 P.M. the meeting adjourned for the night, to reconvene at 8:30 A.M.

Mr. Evans convened the meeting at 9:05 A.M. Tuesday, June 30th. He distributed a draft entitled "Sexual Deviation Law," which he had composed for the Committee's examination and edification.

The Committee agrees, without dissent, to change the title of the law to "Sexual Behavior Law."

Dr. Gessner suggested the elimination of the phrase "performed through the use of inanimate objects or animals" located at the termination of .02.

Dr. Kapchan concurred, pointing out that such terminology might be construed to include magazines containing suggestive pictures.

The problem of a child engaging in fetishism was discussed. Judge Winegart pointed out that none of these laws would apply to any child as defined by Florida Statutes, and that if this came to the attention of the law, it would have, of necessity, been done in public.

Dr. Kapchan stated that ours is supposed to be a free society, and he felt it to be immoral to invade the privacy of human beings if they are in no way encroaching on the rights of another human being. This is a basic point in considering individual freedoms.

Dr. Davis suggested that the individual could be then arrested on the public indecency charge; and that if the person did this in private, no one would know about it, and what is the need in having laws for no purpose.

There was no agreement reached on the retention or deletion of this phrase.

Judge Winegart suggested that throughout this draft, the phrase "child as defined by Florida Statutes," be substituted for specific age references. There were no objections to this suggestion.

Judge Winegart proposed .04(3) be amended to read: "Any lewd fondling." He explained that specific *intent* to arouse was extremely hard to prove.

After discussion, a majority agreed upon this recommendation. There was no opposition to this section being treated as a felony.

Judge Laramore asked the Committee to leave consideration of penalties to all the various sections until a later date when it has been decided exactly what the law would contain and that the group might possibly have someone from the Division of Corrections or other authority to discuss penalties at the next meeting.

There was brief discussion concerning .05, after which there was general agreement that (1), (2) and (3) would be omitted, as these topics were repetitious. It was agreed that (4) and (5) would then become (1) and (2) with the following changes: (1) strike "with the intent" after "child" in the first line. (2) strike "of any nature whatever, with the intent" after "material" in the third line. It was agreed, also, that this section should be considered a misdemeanor.

Sections .06 and .07 were approved.

There was dispute concerning .08. Dr. Kapchan said he felt it should be omitted entirely. The judicial and law enforcement representatives advocated the retention of this proposed statute. No compromise was agreed upon.

Section .09 was amended, omitting (2), changing subsequent numbers appropriately, and modifying (2) to read "A lewd exposure of the body or genital organs."

Section .10 was discussed, as previously, and there was no agreement whatsoever on this proposal.

Incest (.11) was amended to include stepparent - stepchild relationships, and *Aggravated Incest* (.12) was eliminated.

SEXUAL BEHAVIOR LAW

.01 *Short Title* — This Chapter shall be known as the Florida Sexual Behavior Act.

.02 *Definitions* — For the purposes of this act, sexual deviation and deviate sexual conduct shall include, but not be limited to, acts of sexual gratification, or tending to provide sexual gratification, between persons of the same sex; acts of sexual gratification, or tending to provide sexual gratification, involving the sex organs of one person and the mouth or anus of another *(and acts of sexual gratification, or tending to provide sexual gratification, performed through the use of inanimate objects or animals.)

.03 *Rape* — Any person who has sexual intercourse with a female, not his wife, by means of force and against her will, commits rape. Sexual intercourse occurs when there is any penetration of the female sex organ by the male sex organ. A person convicted of rape shall be punished by death, unless a majority of the jury in their verdict recommend mercy, in which event the punishment shall be by imprisonment in the state prison for life, or for any term of years within the discretion of the judge.

.04 *Indecent Liberties with a Child* — Any person of the age of 17 years and upwards who performs or submits to any of the following acts with a child as defined by Florida Statutes commits indecent liberties with a child:

- (1) Any act of sexual intercourse.
- (2) Any act of deviate sexual conduct.
- (3) Any lewd fondling.

Penalty -

.05 *Contributing to the Sexual Delinquency of a Child* — (a) Any person of the age of 17 years and upwards who performs or submits to any of the following acts with any child as defined by Florida Statutes contributes to the sexual delinquency of a child:

- (1) Any lewd act done in the presence of the child.
- (2) Any display, presentation or exposure of the child to lewd, lascivious, obscene, pornographic or otherwise indecent material to arouse or satisfy the sexual desires of the child or person, or both.

(b) It shall not be a defense to contributing to the sexual delinquency of a child that the accused reasonably believed the person not to be a child as defined by Florida Statutes.

(c) Penalty -

.06 *Indecent Solicitation of a Child* — (a) Any person of the age of 17 years and upwards who solicits a child, as defined by Florida Statutes, to do any act, which if done would be an indecent liberty with a child or an act of contributing to the sexual delinquency of a child, commits indecent solicitation of a child.

(b) It shall not be a defense to indecent solicitation of a child that the accused reasonably believed the person not to be a child as defined by Florida Statutes.

(c) Penalty -

.07 *Adultery* — (a) Any person who cohabits or has sexual intercourse with another not his spouse commits adultery, if

- (1) The person is married and the other person involved in such intercourse or cohabitation is not his spouse; or
- (2) The person is not married and knows that the other person involved in such intercourse is married.

(b) Where either of the parties living in an open state of adultery is married, both parties shall be deemed to be guilty of the offense provided for in this section.

(c) Penalty -

*.08 *Fornication* — (a) Any person who cohabits or has sexual intercourse with another not his spouse commits fornication.

(b) Penalty -

.09 *Public Indecency* — Any person who performs any of the following acts in a public place commits a public indecency:

(1) An act of sexual intercourse; or

(2) A lewd exposure of the body or genital organs.

(3) A lewd folding or caress of the body of another person of either sex.

(b) "Public Place" for the purposes of this act means any place where the conduct may reasonably be expected to be viewed by others or which may be frequented by members of the general public.

(b) Penalty -

*.10 *Crimes Against Nature* — (a) The (open or notorious) performance of acts of sexual deviation, as defined but not otherwise provided for in this Chapter, shall be deemed a crime against nature.

(b) Penalty -

.11 *Incest* — (a) Any person who has sexual intercourse or performs an act of deviate sexual conduct with another to whom he knows he is related as follows commits incest:

(1) Father - daughter; or

(2) Mother - son; or

(3) Brother - sister, either of the whole blood or the half blood.

(b) "Daughter" and "Son" for the purpose of this Act, means a blood daughter or son, regardless of legitimacy or age, and also means a stepdaughter or stepson or adopted daughter or son, so long as they are a child as defined by Florida Statutes.

(c) Penalty -

(Bigamy, Prostitution, Sexual Psychopath, Child Molester and Mentally Retarded Child need to be considered in this area)

*.12 *Mandatory Psychiatric and Psychological Examination* — (a) Each person found to be guilty of an act of deviate sexual conduct involving or related to a child as defined by Florida Statutes, shall, before sentencing, be made subject of a psychiatric and psychological examination in accordance with procedures set forth in the Florida Statutes for such examination.

(b) The judge may, in his discretion, order psychiatric and psychological examination of other individuals convicted before him of deviate sexual conduct.

PROPOSALS OF THE GROUP OF PSYCHOLOGISTS AND PSYCHIATRISTS

As fundamental changes:

1. Drop the term "crime against nature" and substitute for it "deviant sex conduct" as defined in the Illinois Code.
2. Drop any mention of animal-human sex relations.
3. Do not penalize the sex conduct of mutually consenting adults, carried out in private, including that defined as "deviant sex conduct."
4. Penalize as public indecency any deviant sex conduct occurring in public (adopt the Illinois section on Public Indecency).

Views concerning steps offered for consideration by the Committee (see Booklet):

1. Mandatory psychiatric examination shall be conducted prior to sentencing, in accordance with the provisions of 801.4 and/or 917.12 (as amended), in the case of every person convicted of the deviant sex conduct with a minor and discretionary pre-sentence examination of others.
2. Provision for out patient psychiatric centers to which offenders or probation or parole may be assigned. (Approved)
3. Providing for the confidentiality of information relating to the first arrest for deviant sexual conduct similar to that now in effect in juvenile cases, with provision that the confidentiality shall be waived upon conviction or a plea of guilty. (Approved)
4. This proposal should be completely stricken—creation of central records, etc.
5. Placing sole jurisdiction of a second offense of deviant sex conduct in a felony court and providing appropriate penalties upon conviction. (Approved)